Supreme Court, U.S.
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87-657

No.

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1987**

JACQUELINE FOWLER
*Petitioner*

vs.

THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY; JOSEPH G. BLAIR, INDIVIDUALLY AND AS SUPERINTENDENT OF THE LINCOLN COUNTY SCHOOLS; LLOYD McGUFFEY; JIM COOPER; IVAN SINGLETON; TOM BLANKENSHIP; AND PAUL PLAYWORTH, INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITIES, RESPECTIVELY, AS A MEMBER OF THE BOARD OF EDUCATION OF LINCOLN COUNTY KENTUCKY,
*Respondents*

**ON WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the Sixth Circuit Court of Appeals failed to follow applicable Supreme Court decisions when reversing the trial court's judgment which was based on findings and conclusions that a public school teacher's First Amendment right of free expression had been violated when she was fired for showing a video movie to high school students by a board of education that disagreed with the ideas and views expressed in the film.

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*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

**To the Honorable William Rehnquist The Chief Justice, and Associate Justices of the Supreme Court of the United States.**

Jacqueline Fowler, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 1, 1987, and for which rehearing was denied on July 21, 1987.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 819 F.2d 657 and is printed in Appendix A, page 1. The judgment of the United States District Court of the Eastern District of Kentucky is printed in Appendix A, page 29. The journal entry of judgment of the United States District Court of the Eastern District of Kentucky is printed in Appendix A, page 51.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A, page 27) was entered on June 1, 1987. A timely petition for rehearing was denied on July 21, 1987 (Appendix A, page 28). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL/STATUTORY PROVISIONS IN-PROVISIONS INVOKED

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

### 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable

exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

In June 1987, the United States Sixth Circuit Court of Appeals reversed the United States District Court for the Eastern District of Kentucky which had found that petitioner Jacqueline Fowler's termination for showing the movie *Pink Floyd - The Wall* (hereinafter *The Wall*) to her students violated her rights under the first amendment and 42 U.S.C. § 1983. Fowler had filed suit challenging her termination invoking the court's jurisdiction pursuant to 28 U.S.C. § 1343 (3) and (4) and 28 U.S.C. § § 1331 and 1343 (3). The case was tried to the court sitting without a jury, which made the following findings of fact and ordered her reinstated with back pay, awarding damages for emotional distress, damage to professional reputation, and out-of-pocket losses. (Record Docket Entry No. 43, pp. 1-11.)

Petitioner Fowler at all relevant times was a duly certified and tenured teacher at the Lincoln County High School in Lincoln County, Kentucky. At the end of 1983-84, she had taught in the school system for fourteen (14) years and for that school year was a classroom teacher of Civics and Latin. Her students ranged from fifteen to eighteen years of age with two younger students at age fourteen.

The respondent Joseph Blair was at all relevant times the duly appointed and acting Superintendent of the Lincoln County Schools, and he was the executive agent for the Lincoln County Board of Education (hereinafter the "Board") with authority to exercise general, supervisory control over the schools. His duties included recommendations to the Board relative to employment and discharge of teachers. The other individual respondents were the members of the respondent Board with authority under state law to manage and control the Lincoln County public schools and to accept

or reject recommendations of the Superintendent relative to discharge of teachers.

Prior to May 31, 1984, Fowler's performance as a teacher was good. In several prior years, she had been selected "Teacher of the Year."

May 31, 1984 was the final day of the school year for students, a non-instructional day in which Fowler's lesson plan indicated she would show a television film and prepare report cards. This was an accepted annual practice for the last day. The school maintained televisions and video equipment to show taped movies along with a library of such videos. There was no policy or regulation requiring a teacher to show only films from the school's video library; requiring a teacher to obtain prior administrative approval for film brought from an outside source; or requiring a teacher to preview the material before showing it to students.

A few days before May 31 several students requested to see *The Wall*. Fowler was not familiar with the film and at first refused to show it. However, on May 30, she did obtain the film from a rental store after being advised by the clerk that although there was some nudity in the film, it contained social issues of importance to teenagers. The film was rated "R" by the Motion Picture Association of America, but there was no rating on the container at the video store. Mrs. Fowler did not preview the film prior to school on May 31 as her home video equipment would not play the VHS format and the film was too long to preview before class on May 31.

On that day, petitioner showed *The Wall* to her students twice. The movie involved the life of rock star Pink Floyd, who in retrospect attempts to understand his insanity. It depicts Pink's father, childhood, failed marriage, drug abuse, and ruined career. At the film's first showing, a student who had previously seen the film in a theater sat next to the television and covered the screen with a file folder in scenes involving nudity or sexually suggestive material. At

times, Fowler herself did the editing.

After the first showing of the ninety-minute movie, Fowler decided the film had sufficient value to show a second time. At the second showing, it was edited substantially as the first time except one scene, "Young Lust," was completely deleted by "fast forwarding" the player. At that second showing, assistant principal Candler visited the room and viewed forty-five minutes to an hour of the film. He left without comment and without any attempt to stop the film.

Later that day, the principal seized the film, and respondents viewed it. The Superintendent then recommended charges to terminate Fowler's contract upon which a hearing was held July 10, 1984. At the end of the hearing, the Board voted to approve the recommendation.

The trial court further found that the film, shown without any editing, contained very little sexually suggestive material. It found that no "simulated" sexual acts or depiction of sexual acts were in the film, but scenes existed where there was an implication a sexual act may have, was or in the future would occur. There were animated scenes where a viewer may be able to perceive sexual overtones. The trial court additionally found that lyrics to the film's background rock music and certain statements of Pink did contain a few four-letter words generally considered obscene; however, no emphasis was placed on them and quite intent listening was required to hear them. The Court additionally found any scenes involving nudity or suggestive conduct were edited from the students' view during the two showings.

The trial court further determined that the respondent Board members admitted that community members approached them who felt Fowler should be fired. The Court, too, found that respondents terminated Fowler because they disagreed with and disliked the views and ideas expressed in *The Wall;* they disagreed because in their view, the film reflected badly on motherhood, family, politics, school

authority, the judiciary, and highly-held social values.

The trial court determined, however, that the film did have artistic, literary, social and political value and that it dealt with numerour issues of public concern to a teenage audience: war, relationships, the danger of totalitarianism, ill effects of drug abuse and alienation, and the importance of family. Following judgment for Mrs. Fowler, the respondents appealed to the Sixth Circuit Court of Appeals which reversed the lower court in a two-to-one decision in which three separate opinions were written. Mrs. Fowler now petitions this Court for a writ of certiorari based on that decision.

## REASONS FOR GRANTING THE WRIT

Several reasons exist to encourage this Court to grant Mrs. Fowler's petition for writ of certiorari. First, the two separate opinions written by the Court's majority conflict with another circuit and depart from the accepted and usual course of judicial proceedings to such an extent to call for this Court's exercise of its power of supervision. Supreme Court Rule 17. Not only are these two opinions out of line with earlier opinions of this Court, but the two majority judges do not agree with each other's view of the law as it pertains to the case. The minority judge strongly disagrees with both of those opinions. Thus, no two judges agree on any legal basis for the reversal of the trial court, a reversal on the law and the court's findings.

Furthermore, the published opinion of the Sixth Circuit involves a case of broad public impact. It conderns the first amendment rights of teachers and students in the public schools. It involves the materials selected for presentation as well as the teaching method selected - use of a video film, a new medium whose place in the classroom is yet to be addressed by this Court.

As mentioned above, the two separate opinions of the majority fail to follow the law earlier enunciated by this Court. Judge Milburn, in what is designated as the opinion of the Sixth Circuit, determined as a matter of law that the showing of *The Wall* was not protected expression because Mrs. Fowler did not show the film as an instruction method and was not sufficiently familiar with its contents so that it could be determined she intended to convey a "particularized message" to her students. He concluded the showing was therfore not "expressive or communicative" resulting in the first amendment not being implicated. The two other judges on the panel both disagreed with this holding, concluding the film was an expression.

Under the law of this Court, Judge Milburn's legal conclusion is in error. Songs, movies and books of entertainment value only are protected by the first amendment just as works of moral philosophy. *Schad v. Mr. Ephraim,* 452 U.S. 61, 65-66 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981); *Zacchini v. Scripps-howard Broadcasting Co.,* 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed. 2d 965 (1977).

Furthermore, this Court has established a long line of cases in which motion pictures have been recognized as a form of protected expression, whether or not shown to convey some particular message, and whether or not the distributor or exhibitor of the film necessarily agrees with, or is aware of, the content of the film, or shows it for anything more than mere entertainment. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, (1975); *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 88 S.Ct. 1289, 20 L.Ed.2d 225, (1968); *Kingsley Corp. v. Regents of University of New York,* 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512, (1959); *Burstyn v. Wilson,* 343 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512, (1959); 777, 96 L. Ed. 1098, (1952).

This Court has firmly stated, "Motion pictures are, of course, protected by the First Amendment." *Interstate Circuit v. City of Dallas,* 390 U.S. at 682. The Court has established that protection without any requirement that those offering the film agree or adopt its views as their own. *Id., Erznoznick v. City of Jacksonville, supra; Kinsgley Corp. v. R. of U. of NY, supra; Burstyn v. Wilson, supra.*

Thus, Judge Milburn has erroneously applied this Court's law in determining that the film was not protected. Furthermore, he erroneously applied the facts in the case since it was uncontroverted in the record and found by the trial court that Fowler was advised prior to the first showing the film had social comment of merit. (Record Docket Entry No., 43, p. 4.) Furthermore, after showing the film once, she

showed it a second time because of the ideas presented. (*Id.* at pi 5.) The facts of record establish that the showing of movie came to the attentio of the school administrators during this second showing.

In a separate opinion, Judge Peck alone determined that although showing the film was protected speech, the portion of the movie dealing with sex, profane language, violence and what he perceived as vulgar images, was not protected. Thus, he decided that under the third step of the *Mt. Healthy* standard, the Board could terminate Fowler for showing those portions of the film. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977). Such a conclusion conflicts with cases previously decided by this Court.

In *Erznoznick v. City of Jacksonville, supra,* this Court held that words or scenes relating to sex and nudity are not necessarily without First Amendment protection simply because they are displayed to minors. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. *Id.,* 422 U.S. at 214-15; 45 L.Ed.2d at 133. Such decision followed this Court's earlier pronouncement that sex and obscenity were not synonymous and that the portrayal of sex in art and literature was not sufficient reason alone to deny a work first amendment protection. *Roth v. U.S.,* 354 U.S 476, 1 LEd.2d 1498, 77 S.Ct. 1304 (1957).

Even if small portions of *The Wall* were not protected Judge Peck's decision is nevertheless erroneous because when speech otherwise not protected is intertwined with protected speech, all of the work must be afforded first amendment protection. *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed2d 284, *reh. den.* 404 U.S. 876, 92 S.Ct. 26, 30 L.Ed.2d 124 (1971). In *Cohen,* this Court held that

wearing a jacket bearing the words "Fuck the draft" was protected speech. That four-letter vulgarity was held to be so intertwined with the political comment that the two could not be separated.

> [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able ... to discern little social benefit that might result from running the risk of opening the door to such grave results.

*Cohen,* 403 U.S. at 26, 29 L.Ed.2d at 294.

The decision of Judge Peck to home in on a few distasteful words not only conflicts with this Court's ruling but conflicts as well with another circuit. The First Circuit has held that a work must be viewed in its entirity with any objectionable material being judged in context. *Keefe v. Geanakos,* 418 F.2d 359 (1st Cir. 1969). In *Keefe,* a teacher was threatened with firing for assigning and discussing in class an *Athlantic Monthly* article containing the word "motherfucker" throughout. That court found the full article deserved protection.

Thus, the opinion of Peck is clearly contrary to the law of this Court and another circuit. Likewise, Judge Milburn's opinion is contrary to the opinions of this Court.

This present case is extremely important, both because it involves Jacqueline Fowler's job in the Lincoln County Schools and the Constitution and law thereunder as it applies to her, and because the Sixth Circuit's published opinion affects all public school teachers in the circuit's four states and potentially affects teachers nationwide.

This Court has strongly and repeatedly recognized that

"[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker,* 364 U.S. 479 at 487, 5 L.Ed.2d 231, 87 S.Ct. 247 (1968). The First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom. *Keyishian v. Board of Regents of the University of New York,* 385 U.S. 589, 17 L.Ed.2d 629, 87 S.Ct. 675 (1967). Rather, the classroom is a "marketplace of ideas" with our future as a nation depending upon leaders whose training is through a wide exposure to a robust exchange of ideas, discovering truth from a multitude of tongues rather than authoritative selection. *Id.*

If this Court fails to grant the writ requested herein, teachers within the Sixth Circuit will have no clear guideline as to what materials they may use in their classroom or under what circumstances they may present the material to students without threat of job loss.

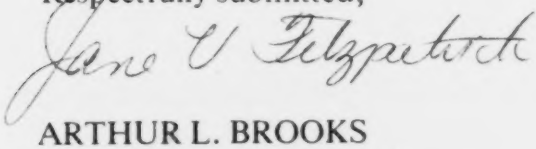
Judge Milburn's opinion requires teachers to thoroughly preview and adopt as their own ideas to be presented to the class. Judge Peck then makes vulnerable to firing any teacher who presents a work containing an objectionable word or thought. Does any teacher then dare present Shakespeare, Chaucer, Vonnegut, or Salinger without fear of the potential consequences?

Thus, to provide clear guidance to teachers and to assure that the right of free expression in the Sixth Circuit complies with this Court's decisions and the status of the law nationwide, a writ of certiorari should issue.

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

We, Arthur L. Brooks and Jane V. Fitzpatrick, attorneys for Jacqueline Fowler, petitioner herein, and members of the Bar of the Supreme Court of the United States, hereby certify that on October 19, 1987, we served three copies of the foregoing Petition for Writ of Certiorari on F.C. Bryan, Esq., and John C. Fogle, Esq., Bryan, Fogle & Chenoweth, P.O. Box 442, Mt. Sterling, KY 40353, and three copies on James Williams, III, Esq., Rankin, Baker & Williams, P.O. Box 225, Stanford, KY 40484, attorneys for respondents, by first class mail postage prepaid at the above said addresses.

Dated ~~September~~ October 19, 1987.

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# Appendix

Nos. 85-5815/5835

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY; JOSEPH G. BLAIR, Individually and As Superintendent of the Lincoln County Schools; LLOYD MCGUFFEY; JIMMY COOPER; IVAN SINGLETON; TOM BLANKENSHIP; and PAUL PLAYFOURTH, Individually and Each in His Official Capacities, Respectively, As a Member of the Board of Education of Lincoln County, Kentucky,

*Defendants-Appellants, Cross-Appellees.*

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed June 1, 1987

Before: MERRITT and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

MILBURN, Circuit Judge, delivered the opinion of the court. PECK, Senior Circuit Judge, (pp. 20-23) delivered a separate concurring opinion. MERRITT, Circuit Judge, (pp. 24-26) delivered a separate dissenting opinion.

MILBURN, Circuit Judge. Defendants, The Board of Education of Lincoln County, Kentucky, individual board members, and the Superintendent of the Lincoln County Schools, appeal from the judgment of the district court awarding reinstatement and damages to plaintiff Jacqueline Fowler on the ground that her employment was terminated in violation of her First Amendment rights. Plaintiff cross-appeals on the ground that K.R.S. § 161.790(1), which proscribes conduct unbecoming a teacher, is unconstitutionally vague as applied to her conduct. For the reasons that follow, we vacate the judgment of the district court and dismiss plaintiff's action.

## I.

Plaintiff Jacqueline Fowler was a tenured teacher employed by the Lincoln County, Kentucky, school system for fourteen years. She was discharged in July, 1984 for insubordination and conduct unbecoming a teacher. The basis for this action was that she had an "R" rated movie, *Pink Floyd - The Wall*, shown to her high school students on the last day of the 1983-84 school year. The students in Fowler's classes were in grades nine through eleven and were of the ages fourteen through seventeen.

The day on which the movie was shown, May 31, 1984, was a noninstructional day used by teachers for completing grade cards. A group of students requested that Fowler allow the movie to be shown while she was completing the grade cards. Fowler was unfamiliar with the movie and asked the students whether it was appropriate for viewing at school. Charles Bailey, age fifteen, who had seen the movie on prior occasions, indicated that the movie had "one bad place in it." Joint Appendix at 291.

Fowler rented the video tape at a video store in Danville, Kentucky. The clerk who rented the "R" rated tape to Fowler told her that there was some nudity in the movie during a song called "Young Lust" and warned that she might wish to delete that section. Joint Appendix at 82-83. However, Fowler did not preview the movie before having it shown to her morning class because the store did not have a tape compatible with her own VCR and because she did not have time to make other arrangements to preview the movie. Joint Appendix at 83, 103, 307.

When Fowler had the movie shown on the morning of May 31, 1984, she instructed Charles Bailey, the fifteen-year-old student who had seen the movie, to edit out any parts that were unsuitable for viewing at school. He did so by attempting to cover the 25" screen with an 8½" by 11" letter-sized file folder. Joint Appendix at 83-84.

There is conflicting testimony as to whether, or how much, nudity was seen by the students. At the administrative hearing, several students testified that they saw no nudity. Joint Appendix at 265-89. One student testified that she saw "glimpses" of nudity, but "nothing really offending." Joint Appendix at 321. Assistant Principal Michael Candler, who observed the movie during part of the afternoon showing, testified that Charles Bailey's editing attempt was not sufficient to preclude the students from seeing the nudity. Joint Appendix at 242-46. On cross-examination, Charles Bailey testified that Mrs. Fowler told him to open the file folder while editing after Candler entered the room. Trial Transcript Vol. I at 108-09. It is undisputed that the audio portion of the movie, which contained enough offensive language to mandate an automatic "R" rating under motion picture industry standards, was played through the entire movie. Joint Appendix at 114, 186-87.

There is also conflicting testimony regarding the amount of sexual innuendo existing in the "unedited" version of the film. Because some parts of the film are animated, they are

susceptible to varying interpretations. One particularly controversial segment of scenes is animated in which flowers appear on the screen, are transformed into the shape of male and female sex organs and then engage in an act of intercourse. This segment of the film was shown in the morning session. Joint Appendix at 120-22. Other segments involving a violent rape, nudity, a suggestion of oral sex, and a naked woman and naked man in bed engaging in foreplay and intercourse were also shown in the morning. Trial Transcript I at 101.[1]

Once again, there is conflicting testimony concerning the effectiveness of the editing attempt. Moreover, there is testimony supporting the fact that more editing was done in the afternoon showing than in the morning showing.[2]

---

[1]The district court found that the movie "contains a very limited amount of material which is sexually suggestive," that the movie does not contain "any 'simulation' of a sexual act," and that "any scenes involving nudity or suggestive conduct were edited from the view of students" during both showings. District Court Opinion at 6. We have viewed the film in conjunction with Fowler's testimony concerning the portion of the film which were edited during the two showings, and we conclude that the district court's findings in this regard are clearly erroneous. Similarly, his finding that Fowler formed an opinion regarding the significance of the film during the morning showing is clearly erroneous. It is undisputed that Fowler left the room several times while the movie was being shown, and that she was posting grades during the time she was present in the classroom. Having considered the entire record, including the viewing of the movie, and in holding that the district court's findings of fact are clearly erroneous, we are left with a "definite and firm conviction that. . . mistake(s) ha(ve) been committed." *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), and *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

[2]Fowler testified that she left the classroom on several occasions while the movie was being shown. Joint Appendix at 113-14. However, she stated that she believed Charles Bailey when he told her that he continued to edit while she was gone. Joint Appendix at 308-09.

In addition to the sexual aspects of the movie, there is a great deal of violence. One scene involves a bloody battlefield. Joint Appendix at 129-30. Another shows police brutality. Joint Appendix at 132-33. Another shows the protagonist cutting his chest with a razor. Joint Appendix at 127. Another scene shows children being fed into a giant sausage machine. Joint Appendix at 137.

On the afternoon of May 31, 1984, Principal Jack Portwood asked Fowler to give him the video tape, and she did so. After the movie was viewed by the superintendent and members of the Lincoln County Board of Education, proceedings were instituted to terminate Fowler's contract.

Plaintiff Fowler received her termination notice on or about July 19, 1984. The notice advised her that a hearing would be held on July 10, 1984, and she subsequently advised the board of her intention to appear at the hearing and contest the charges.

On July 10, 1984, plaintiff Fowler appeared with counsel at the administrative hearing. She testified that, despite the fact that she had never seen the movie before having it shown to her students, and despite the fact that she was posting grades on report cards and left the room several times while the movie was being shown, she believed it had significant value. She believed the movie portrayed the dangers of alienation between people and of repressive educational systems. She testified that she would show an edited version of the movie again if given the opportunity to explain it. She stated that she did not at any time discuss the movie with her students because she did not have enough time.

The board viewed the movie once in its entirety and once as it had been edited in the classroom. The board then retired into executive session. Following this executive session, the board returned to open session and voted unanimously to terminate plaintiff's employment for insubordination and conduct unbecoming a teacher.

Following her termination, plaintiff Fowler initiated her

action in the district court alleging that her First and Fourteenth Amendment rights were violated by her discharge, and that the Kentucky statutes forming the basis for her discharge were unconstitutionally vague or overboard. She also alleged that the factual findings made in support of her discharge were not supported by substantial evidence.

At the bench trial in the district court, Fowler repeated her contention that she believed the movie contained important, socially valuable messages. School officials testified that they objected to the movie because it promoted values which were described as immoral, antieducation, antifamily, antijudiciary, and antipolice. Joint Appendix at 198, 200, 204, 207, 212, 223, 249-50, 255. They also found the movie objectionable because of its sexual content, vulgar language, and violence. Joint Appendix at 199, 201, 207, 212-13, 223, 226, 251.[3]

The district court concluded that Fowler's conduct was protected by the First Amendment, and that she was discharged for exercising her constitutionally protected rights. Consequently, it awarded her reinstatement, back pay with interest, reimbursement of funds necessary for her reinstatement with the Kentucky Teachers Retirement System, damages for emotional distress and damage to professional reputation, compensatory damages for costs incurred in seeking new employment, costs, and attorney's fees.

The district court concluded that Fowler was not insubordinate because she did not violate an established rule or regulation, and also found the plaintiff's due process rights were not violated by the procedures utilized at the administrative hearing. Finally, the district court concluded that K.R.S § 161.790(1)(b) was not vague or overboard, apparently for

[3]To the extent that the district court's finding of fact number 34 may be interpreted as a finding that the defendants objected to the film only on an ideological level, the finding is clearly erroneous. The record is replete with testimony indicating that school officials objected to the sexual content, vulgarity, and violence contained in the movie.

the reason that, because Fowler's conduct was protected by the First Amendment, such conduct "as a matter of fact and law did not constitute conduct unbecoming a teacher." District Court Opinion at 23.

In this appeal, defendants contend that the district court erred in its conclusion that plaintiff's discharge violated her First Amendment rights. Plaintiff cross-appeals from the holding that K.R.S. § 161.790(1)(b) is not unconstitutionally vague.

## II.

### A.

In its opinion, the district court relied upon the analytical framework provided by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977). Under the *Mt. Healthy* standard, a public employee establishes a prima facie case of a constitutional violation if she shows that she was engaged in protected activity, and that such activity was a substantial or motivating factor in the decision to terminate her employment. *Id.* at 287. In order to defend itself against such a claim, the government must establish by a preponderance of the evidence that the decision to terminate would have been made in the absence of the exercise of the constitutionally protected right. *Id.*

In the present case, it is undisputed that plaintiff's employment was terminated because she had the "R" rated movie shown to her students and because she said she would do it again. Consequently, the focus of our inquiry is whether Fowler's conduct was constitutionally protected.

The Supreme Court has consistently recognized the importance of the exercise of First Amendment rights in the context of public schools.

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be

> argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

*Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506 (1969). Many courts have recognized that a teacher's First Amendment rights encompass the notion of "academic freedom" to exercise professional judgment in selecting topics and materials for use in the course of the educational process. *See, e.g., Stachura v. Truszkowski,* 763 F.2d 211, 215 (6th Cir. 1985), *rev'd in part on other grounds,* 106 S. Ct. 2537(1986); *Kingsville Independent School District v. Cooper,* 611 F.2d 1109, 1113 (5th Cir. 1980); *Cary v. Board of Education,* 598 F.2d 535, 362 (1st (10th Cir. 1979); *Keffe v. Geanakos,* 418 F.2d 359, 362 (1st Cir. 1969); *Dean v. Timpson Independent School District,* 486 F. Supp. 302, 307 (E.D. Tex. 1979). *See generally Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967) (discussing importance of academic freedom).

Among the "special circumstances" which must be considered in defining the *scope* of First Amendment protection inside the classroom is the "inculcat *[ion of]* fundamental values necessary to the maintenance of a democratic political system." *Bethel School District No. 403 v. Fraser,* 106 S. Ct. 3159, 3164 (1986) (quoting *Ambach v. Norwick,* 441 U.S. 68, 76-77 (1979).

> Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools."

*Fraser,* 106 S. Ct. at 3165 (quoting *Ambach,* 441 U.S. at 76-77, and *Tinker,* 393 U.S. at 508).

The single most important element of this incalcative process is the teacher. *"Consciously or otherwise, teachers... demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." Fraser,* 106 S.Ct. at 3165 (emphasis supplied). *See also Ambach,* 441 U.S. at 76-77. *"To regard teachers - in our entire educational system, from the primary grades to the university - as the priests of our democracy is therefore not to indulge in hyperbole." Weiman v. Updegraff,* 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) (emphasis supplied).

The accommodation of these sometimes conflicting fundamental values has caused great tension, particularly when the conflict arises within the classroom. *See, e.g., Martin v. Parish,* 805 F.2d 583 (5th Cir. 1986); *Zykan V. Warsaw Community School Corp.,* 631 F.2d 1300(7th cir. 1987); *Russo v. Central School District No. 1,* 469 F.2d 623 (2d Cir. 1972), *cert. denied,* 411 U.S. 932 (1973); *James v. Board of Education,* 461 F.2d 566 (2d Cir.), *cert. denied,* 409 U.S. 1042 (1972). In the final analysis,

> [t]he ultimate goal of school officials is to insure that the discipline necessary to the proper functioning of the school is maintained among both teachers and students. Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially justified . . . "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

*James,* 461 F.2d at 571-72 (quoting *Pickering v. Board of*

*Education,* 391 U.S. 563, 568 (1968)); *see also Anderson v. Evans,* 660 F.2d 153, 157 (6th Cir. 1981); *Russo,* 469 F.2d at 631.

In the present case the district court concluded that Mrs. Fowler was entitled to the protection of the First Amendment *while acting as a teacher.* That a teacher does have First Amendment protection under certain circumstances cannot be denied. *See Tinker,* 393 U.S. 506; *James,* 461 F.2d at 571. Likewise, a motion picture is a form of expression which may be entitled to the protection of the First Amendment. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-02 (1952).

However, I conclude that Fowler's conduct in having the movie shown under the circumstances present here did not constitute expression[4] protected by the First Amendment.[5] It is undisputed that Fowler was discharged for the showing of the movie, *Pink Floyd - The Wall.* Such conduct, under the circumstances involved, clearly is not "speech" in the traditional sense of the expression of ideas through use of the spoken or written word.

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[4]Whether a certain activity is entitled to protection under the First Amendment is a question of law. *See, e.g., Sern v. Shouldice,* 706 F.2d 742 (6th Cir.), *cert. denied,* 464 U.S. 993 (1983).

[5]Plaintiff relies on *Minarcini v. Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976), for the proposition that students in a public school have a constitutionally protected right "to receive information which they and their teachers desire them to have." *Id.* at 583. In *Minarcini,* this court held that this "right to know" was violated by the removal of library books solely on the basis of the social and political tastes of the school board. The existence of such a "right to know" was considered by the Supreme Court in *Board of Education, Island Trees Union Free School District No. 26 v. Pico,* 457 U.S. 853 (1982). Only three justices agreed that students possess a constitutionally protected entitlement to access to particular books in the school's library. *Id.* at 863-69. Moreover, even these three justices explicitly noted that the decision regarding this right did not extend to the classroom. *Id.* at 862, 869. For similar reasons, plaintiff's reliance on *Pratt v. Independent School District No. 831,* 670 F.2d 771 (8th Cir. 1982) is misplaced.

Nevertheless, the Supreme Court has long recognized that certain forms of expressive conduct are entitled to protection under the First Amendment. *See Spence v. Washington,* 418 U.S. 405, 409-12 (1974) (per curiam) (display of flag with peace symbol attached was expressive conduct entitled to protection under First Amendment); *Tinker,* 393 U.S. at 505 (wearing black armband was conduct akin to pure speech); *Brown v. Louisiana,* 383 U.S. 131, 141-42 (1966) (sit-in by black students in "whites only" library was symbolic speech); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 633-34 (1943) (flag salute is a form of expression); *Stromberg v. California,* 283 U.S. 359, 368-69 (1931) (display of red flag is expressive conduct).

However, not every form of conduct is protected by the First Amendment right of free speech.

> To determine whether (plaintiff's) conduct is entitled to first amendment protection, "the nature of (plaintiff's) activity, combined with the factual context and environment in which it was undertaken" must be considered. *Spence v. Washington,* 418 U.S. 405, 409-10, 94 S. Ct. 2727, 2729-30, 41 L.Ed.2d 842 (1974). If (plaintiff) shows "(a)n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it," *id.* at 410-11, 94 S.Ct. at 2730-31, the activity falls within the scope of the first and fourteenth amendments.

*Monroe v. State Court of Fulton County,* 739 F.2d 568, 571 (11th Cir. 1984). *Cf. Jarman v. Williams,* 753 F.2d 76, 77-78 (8th Cir. 1985) (nonexpressive dancing constitutes conduct not entitled to protection of the First Amendment).

In the present case, it is undisputed that Fowler did not see the movie before she had it shown to her class on the mor-

ning of May 31, 1984, a noninstructional day.[6] Fowler agreed to allow the movie to be shown, at the students' request, because May 31 was "their treat type of day." Joint Appendix at 291. It is also undisputed that she left the room on several occasions while the film was being shown. Under circumstances such as these, I cannot conclude that Fowler possessed "(a)n intent to convey a particular message" to her students. *Spence*, 418 U.S. at 410. The mere fact that at some point she may have developed an approval of the content of the movie is not, standing alone, a sufficient basis for the conclusion that her conduct in having the movie shown was a form of expression entitled to protection under the First Amendment.

> If any sort of conduct that people wish to engage in is to be considered "speech" simply because those who engage in conduct are, in one sense, necessarily expressing their approval of it, the line between "speech" protected by the First Amendment and conduct not so protected will be destroyed.

*Jarman*, 753 F.2d at 78.

Moreover, the surrounding circumstances in the present case indicate that there was little likelihood "that the message would be understood by those who viewed it." *Spence*, 418 U.S. at 411. As we have noted, the "R" rated movie was shown on a noninstructional day to students in Fowler's classes in grades nine through eleven who were of ages

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[6]Plaintiff's reliance upon cases grounded in the concept of "academic freedom," *e.g.*, *Cooper*, 611 F.2d at 1113; *Dean*, 486 F. Supp. at 307; *Parducci v. Rutland*, 316 F. Supp. 352, 352 (M.D. Ala. 1970), is misplaced. These cases are based upon the notion that teaching is a form of activity protected by the Fist Amendment. We do not intimate that a teacher is entitled to the protection of the First Amendment *only* when teaching. *See, e.g.*, *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979); *Mt. Healthy*, 429 U.S. at 282-84. However, the fact that Fowler's conduct was unrelated to the educational process does remove it from the protection afforded by the concept of academic freedom.

ranging from fourteen through seventeen. Furthermore, Fowler never at any time made an attempt to explain any message that the students might derive from viewing the movie.

Thus, this case is distinguishable from those in which the Supreme Court has afforded First Amendment protection in cases involving expressive conduct. In *Spence*, the undisputed facts established that the appellant hung a United States flag with a peace symbol affixed to it because he "wanted people to know that (he) thought America stood for peace." 418 U.S. at 409. Moreover, in *Spence*

> appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. . . A flag bearing a peace symbol and displayed upsidedown by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it.

*Id.* at 410 (citation omitted). Because the intent to express was coupled with a great likelihood that the message would be understood, the Court concluded that the conduct was entitled to protection under the First Amendment.

Similarly, in *Tinker*, the uncontroverted evidence showed that the students who wore the black armbands were engaged in an expression of opposition to the Vietnam war, which the Court concluded was akin to "pure speech." 393 U.S. at 505-08. *See also James*, 461 F.2d at 568-69. And in *Barnette*, the court recognized that a flag salute is a form of communicative conduct which implicates the First Amendment. 319 U.S. at 6332.

The cases just discussed demonstrate that conduct is protected by the First Amendment *only* when it is expressive or

communicative in nature.[5] In the present case, because plaintiff's conduct in having the movie shown cannot be considered expressive or communicative, under the circumstances presented, the protection of the First Amendment is not implicated. *See Jarman*, 753 F.2d at 77.[6]

**B.**

Plaintiff argues that Ky. Rev. Stat. § 161.790(1)(b), which proscribes "conduct unbecoming a teacher." is unconstitutionally vague as applied to her because the statute failed to give notice that her conduct would result in discipline. We find this argument to be without merit.

The vagueness doctrine requires that a statute proscribing certain conduct must be drafted "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293, 1295 (6th Cir. 1986).

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[5]Even when the actor *does* intend to communicate a message by his conduct, a governmental interest in regulating the nonspeech aspect of such conduct may justify incidental restrictions on the speech aspect as well. The Supreme Court has recognized that not every form of "conduct can be labeled 'speech' whenever the person engaging in the conduct intends therby to express an idea." *O'Brien*, 391 U.S. at 376.

[6]The dissent relies upon *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), for the general proposition that entertainment enjoys First Amendment protection. While this is a general principal of law espoused by the Supreme Court on several occasions, the Court has also indicated that in determining whether a given type of entertainment is protected by the First Amendment, it will look to the kind of entertainment involved and the appropriateness of the entertainment under the circumstances such as the time and place where offered. In my view, both of the cases cited by the dissent are inapposite. Rather, the proper focus of our inquiry is whether Fowler was engaged in expressive activity protected by the First Amend-

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing ... statutes both general enough to take into account a variety of human conduct and sufficiently specifiic to provide fair warning that certain kinds of conduct are prohibited.

*Colten v. Kentucky*, 407 U.S. 104, 110 (1972). The fundamental principles of due process are violated only when "a statute ... either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

In the context of statutory provisions governing employee discipline, the Supreme Court has recognized the inherent difficulty in drawing statutes which are broad enough to cover a wide range of conduct, yet narrow enough to give fair warning. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the Court concluded that the term "such cause as will promote the efficiency of the service" was not an unconstitutionally vague standard for employee discharge.

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

*Id.* at 159 (quoting *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 578-79 (1973).

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ment, and nothing in the record would indicate that she was so engaged. In my view, the facts of the present case do not fit any of the Supreme Court cases that have been decided to date. We emphasize that our decision in this case is limited to the peculiar facts before us.

"[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catchall' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.' " *Arnett*, 416 U.S. at 161 (quoting *Meehan v. Macy*, 392 F.2d 822, 835 (D.C. Cir. 1968), *modified*, 425 F.2d 469 (D.C. Cir.), *aff'd en banc*, 425 F2d 472 (D.C. Cir. 1969).

A number of courts have rejected vagueness challenges when an employee's conduct clearly falls within a statutory or regulatory prohibition. For example, in *Frison v. Franklin County Board of Education*, 596 F.2d 1192 (4th Cir. 1979), a teacher was demoted after an incident in which she disciplined students caught passing notes by reading the note in class and explaining "that three vulgar colloquialisms contained in the note were not obscene when used in different contexts." *Id.* at 1193. She argued that the statute governing her demotion, which required teachers to maintain discipline and encourage morality, failed to give adequate notice that her conduct was a ground for discipline. The court disagreed, concluding that "[t]he regulations prescribing a teacher's speech and conduct are necessarily broad; they cannot possibly mention every type of misconduct." *Id.* at 1194. Under the circumstances of that case, the court concluded that plaintiff's discharge was not constitutionally offensive.

Similarly, in *Wishart v. McDonald*, 500 F.2d 1110 (1st Cir. 1974), a teacher was discharged for public displays of deviate sexual behavior under a statute proscribing "conduct unbecoming a teacher." The court rejected plaintiff's vagueness challenge on the ground that his behavior "was sufficiently odd and suggestive that the ordinary person would know, in advance, that his image as an elementary school teacher would be gravely jeopardized." *Id.* at 1116. *See also In re Matter of Certain Complaints under Investigation*, 783 F.2d 1488, 1512-13 (11th Cir.) (dicta in-

dicating that standard of "conduct prejudicial to the effective and expeditious administration of the business of the courts" was sufficiently clear to put judge on notice that criminal, potentially impeachable offenses would trigger investigiation), *cert. denied*, 106 S.Ct. 3273 (1986); *Smith v. Price*, 616 F.2d 1371, 1379 n. 10 (5th Cir. 1980) ("conduct unbecoming an officer" standard gave notice that reckless gunplay was subject to discipline); *Kannisto v. San Francisco*, 541 F.2d 841, 844-45 (9th Cir. 1976) (insubordinate acts were clearly within scope of regulation governing "unofficerlike conduct"; regulation not vague as applied), *cert. denied*, 430 U.S. 931 (1979); *diLeo v. Greenfield*, 541 F.2d 949 (2d Cir. 1976) (teacher could not successfully contend that "due and sufficient cause" standard did not give notice that improper conduct toward students would result in discipline); *Kilpatrick v. Wright*, 437 F. Supp. 397 (M.D. Ala. 1977) ("immorality" standard not vague as applied to teacher discharged for making sexual advances toward his students). *See also Fraser*, 106 S. Ct. at 3166 (recognizing need for flexibility in formulating school disciplinary rules).

In the present case, plaintiff Fowler had a fifteen-year-old student show a controversial, highly suggestive and somewhat sexually explicit movie to a group of high school students aged fourteen to seventeen. She did not preview the movie, despite the fact that she had been warned that portions were unsuitable for viewing in this context. She made no attempt at any time to explain the meaning of the movie or to use it as an educational tool. Rather, she had it shown for the purpose of keeping her students occupied during a noninstructional day while she was involved in posting grades on report cards. We conclude that the statute proscribing "conduct unbecoming a teacher" gave her adequate notice that such conduct would subject her to discipline. Accordingly, we conclude that the statute is not unconstitutionally vague as applied to Fowler's conduct.

C.

Finally, we must determine whether plaintiff's conduct constituted "conduct unbecoming a teacher" within the meaning of Ky. Rev. Stat. § 161.790(1) (b).[9] Our analysis is guided by two recent decisions by the Kentucky Supreme Court.

In *Board of Education v. Wood*, 717 S.W.2d 837 (Ky. 1986), two tenured teachers were discharged for conduct unbecoming a teacher under section 161.790(1)(b). The evidence in *Wood* established that the teachers had been smoking marijuana with two fifteen-year-old students in the teachers' apartment. *Id.* at 839-40.

The court noted that "[t]he evidence indicates that there was serious misconduct of an immoral and criminal nature and a direct connection between the misconduct and the teachers' work." *Id.* at 830. The court went on to view this conduct in light of the purpose for teacher tenure.

> The purpose of teacher tenure laws is to promote good order in the school system by preventing the arbitrary removal of capable and experienced teachers by political or personal whim.... A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. The school teacher has traditionally been regarded as a moral example for the students.

*Id.* Under the circumstances present, the court concluded that a discharge for conduct unbecoming a teacher could be upheld. *Id. at* 840. *See also board of Education v. McCollum*

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[9]Ky. Rev. Stat. § 161.790 provides in relevant part:

(1) The contract of a teacher shall remain in force during good behavior and efficient and competent service by the teacher and shall not be terminated except for any of the following causes:

...

(b) Immoral character or conduct unbecoming a teacher ...

721 S.W.2d 703 (Ky. 1986) (upholding discharge for conduct unbecoming a teacher when teacher filed false affidavit regarding sick leave and lied about time spent with student in course of special home instruction program).

In the present case, we conclude that plaintiff's conduct, although not illegal, constituted serious misconduct. Moreover, there was a direct connection between this misconduct and Fowler's work as a teacher. She introduced a controversial and sexually explicit movie into a classroom of adolescents without preview, preparation or discussion. In the process, she abdicated her function as an educator. Her having the movie shown under the circumstances involved demonstrates a blatant lack of judgment. Having considered the entire record, including the viewing of the movie, which we describe as gross and bizarre and containing material completely unsuitable for viewing by a classroom of students aged fourteen to seventeen, we conclude that such conduct falls within the concept of conduct unbecoming a teacher under Kentucky law.[10]

## III.

Accordingly, for the reasons stated, the judgment of the district court is VACATED, and this cause is DISMISSED.

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[10]The school board stated insubordination as an alternate ground for plaintiff's dismissal. The district court concluded that plaintiff was not insubordinate because she did not violate any established rule or regulation, nor did she refuse to obey the directions of her superiors. Because we conclude that plaintiff's discharge may be upheld under the charge of conduct unbecoming a teacher, we need not reach this issue.

PECK, Senior Circuit Judge, concurring. I agree with Judge Milburn's decision that the school board's termination of Ms. Fowler's teaching contract did not violate her First Amendment right of free expression but write separately because I reach this result by a different route. In my view this case should be decided under the "mixed motive" analysis of *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 285-87 (1977), as suggested by Judge Merritt's dissent, particularly when viewed in the context of the post-*Mt. Healthy* cases of *Board of Educ. v. Pico,* 457 U.S. 853 (1982) and *Bethel School Dist. v. Fraser,* 106S.Ct.3159 (1986). However, for the reasosns stated below I would hold that the school board properly discharged Ms. Fowler.

Judge Milburn does not inquire into the motivation of the school board but rather bases his decision on the fact that Ms. Fowler's action in showing the film to her classes was not conduct protected by the First Amendment. He finds that Ms. Fowler did not possess "[a]n intent to convey a particularized message" to her students because she was not familiar with the content of the film before she showed it, citing *Spence v. Wahsington,* 418 U.S. 405, 410 (1974). He expresses the further view that there was "little liklehood that the message would be understood by those who viewed it," *id.* at 411, because Fowler did not explaing the messages contained in the film to the students. I would suggest that the rationale underlying *Spence v. Wahsington* (display of flag with peace symbol attached) and other cases cited by Judge Milburn, e.g., *Brown v. Louisiana,* 383 U.S. 131 (1966) (sit-in by blacks at "whites only" library), *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943) (flag salute), are inapposite because they involve examples of symbolic expression, not verbal communication, and articulate guidelines for determining what symbolic acts *may* constitute expression. These cases do not lend themselves to the reverse purpose of defining what kind of communication can *not* be expressive. This court, in my opinion, should not offer an advisory opinion as to what constitutes an intent to

communicate and how much knowledge of the content of a presentation is needed before it can be embraced as one's own expression. The more important question is not the motive of the speaker so much as the purpose of the interference. I would also question the notion that an explanation from the teacher was necessary before the class was likely to understand the themes and viewpoints contained in this film.

The Supreme Court in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), has acknowledged that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." I believe a teacher should be similarly protected by the First Amendment whether she is participating in an instructional or non-instructional day. *See, e.g., Mt. Healthy City School Dist Bd. of Educ.*, 429 U.S. 274 (1977) (finding a teacher's communication with a radio station regarding school board policies was constitutionally protected activity); *Givhan v. Western Line Consol. School Dist.* 439 U.S. 410 (1979) (holding that a conversation by a teacher and principal in the principal's office, a private expression by a public employee, was protected speech). Certainly there is greater cause for school board interference when acting within its discretion to establish curriculum, and therefore in requiring a teacher to follow the prescribed curriculum. *See Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976) (finding no constitutional violation in the Board's exercise of curriculum and textbook control, while, at the same time, determining that the board had wrongly removed books from the library).

I would hold, rather, that the district court properly used the *Mt. healthy* standard to decide whether Ms. Fowler's discharge violated the First Amendment, but erred in its finding that, but for Ms. Fowler's constitutionally protected activity of communicating various ideas and political thoughts to her students, she would not have been fired. The Court in *Mt. Healthy* set the standard that once the plaintiff had

shown that his conduct was constitutionally protected and that his conduct was a substantial or motivating factor in the Board's decision to discharge or not to rehire, the school board then must show that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287.

In examining the motivation of the school board, while the school board clearly expressed displeasure with the anti-establishment focus of the film, the board also found the method of the film to be highly inappropriate for its students. That method was to use sexual innuendo and sexually explicit material, some profane language, violence, and vulgar images, to tell the story of the film. The school board was also motivated by the poor judgment used by the teacher in not previewing an R-rated film and in the cavalier manner in which she allowed the film to be shown and "edited" by a student. It is speculation to say how much the school board was swayed by the fact that Ms. Fowler did not exhibit second thoughts on having shown the film, and not only did not see the "error of her ways" but said that she would show the film again if given the opportunity. The dissent accurately points out that "the school board did not like the content of the movie" but their objections to the "immoral" content of the film were intertwined with constitutionally permissible objections to the film's above mentioned vulgarity and unsuitability for the student age group and cannot survive the "but for" test of *Mt. Healthy*. Ms. Fowler's after the fact that she used poor judgment and should not shield her from the consequences.

The *Mt. Healthy* case, involving actions by a teacher outside the school environment, must be viewed in light of the court's deference to the autonomy of school boards in regulating the educational process. The plurality opinion of *Pico*, 457 U.S. 853 (1982) used the *Mt. Healthy* case as precedent to decide whether the school board in that case acted properly in removing books from the school library. Justice Brennan restated the test to decide intent and asserted:

> Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depend upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.

*Id.* at 871.

Justice Brennan apparently concludes that a school board may make proper objections to content that is pervasively vulgar or educationally unsuitable but warns that this may not be asserted to mask a decision interfering with the communication of political ideas with which they disagree. The objections to the method of communication in the film at issue in the present case cannot be seen as a sham or cover-up but as valid objections to a film the board thought inappropriate for classroom viewing.

The Court in the recent case of *Bethel School Dist. v. Fraser,* 106 S.Ct. 3159 (1986), further supported the schools board's authority to take action against conduct it considered vulgar and offensive and disruptive of educational process. This court need not go as far as the Court did in *Pico* and *Bethel* because those cases respectively involved school libraries and a school assembly and did not have the captive audience factor with the teacher acting *in loco parentis* that is present in this case.

As herein above indicated, I concur in the result reached in Judge Milburn's opinion.

MERRITT, Circuit Judge, dissenting. Federal judges and local school boards do not make good movie critics or good censors of movie content. What one judge sees as "gross and bizarre," another may find, as did District Judge Scott Reed below, mild and not very "sexually suggestive."

The movie here seems to me to present a message similar to that expounded by Dr. Spock: abuse of sex and drugs as well as various forms of mental instability and anti-social conduct are associated with an overly authoritarian society. The message is that unloving, overly rigid and authoritarian parents, teachers, judges and officials create disturbed individuals and societies. This lack of love is the figurative "wall" shown in the movie.

But whatever the meaning of the movie, however good or bad it may be, my main concern is that the holdings of both Judge Milburn and Judge Peck are in error. Judge Milburn makes a distinction between "academic freedom" and showing a movie in class:

> We do not intimate that a teacher is entitled to the protection of the First Amendment *only* when teaching. *However, the fact that Fowler's conduct was unrelated to the educational process does remove it from the protection afforded by the concept of academic freedom.*

Opinion of Judge Milburn at p. 12 n. 6 (emphasis added) (citations omitted). Judge Milburn states further that "plaintiff's conduct in having the movie shown cannot be considered expressive or communicative. . ." *Id.* at p. 14.

Purely expressive works—songs, movies and books of entertainment value only—are protected by the First Amendment just like works of moral philosophy. *See Schad v. Mt. Ephraim,* 452 U.S. 61, 65-66 (1981) (entertainment protected same as political or ideological speech); *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 578 (1977) ("no doubt that entertainment . . . enjoys First Amendment protection"). *See also Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 231 (1977) ("But our cases have never suggested that expression about philosophical, social, artisitc, economic, literary, or ethical matters - to take a nonexhaustive list of labels - is not entitled to full First Amendment protection.").

In fact, Mrs. Fowler was not discharged because she entertained her students: she was discharged because the school board did not like the content of the movie. Mrs. Fowler proved at trial, as Judge Milburn says at page 6 of his opinion, that she was discharged because the board members regarded the movie as "immoral, antieduction, antifamily, antijudiciary, and antipolice." There is no support for the proposition - nor does the school board argue - that a teacher's academic freedom or a student's right to hear may be abridged simply because a school board dislikes the content of the protected speech. Furthermore, since this was a "free day" for the students, no departure from a board-mandated curriculum occurred. It is obvious, therefore, that Mrs. Fowler's discharge was prompted by the content of the movie.

Assuming that the school board could have properly discharged Mrs. Fowler for poor judgment and lack of remorse in showing an "R-rated" movie which had short scenes depicting nudity and sexual foreplay, but not for the other reasons given, this case must be decided under the "mixed-motive" analysis of *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). Where a plaintiff can show that her constitutionally-protected conduct was a "substantial" or "motivating" factor in the discharge decision, the employer must prove "by a preponderance of the evidence that it would have reached the same decision as to ... re-employment even in the absence of the protected conduct." *Mt. Healthy,* 429 U.S. at 287.

Although Judge Peck's opinion concedes that "the school board clearly expressed displeasure with the antiestablishment focus of the film," he argues nonetheless that the board's "objections to the 'immoral' content of the film were intertwined with constitutionally permissible objections to the film's above mentioned vulgarity and unsuitability for the student age group ...." Opinion of Judge Peck at p. 22. I do not believe an argument based on intertwining can be

used to suppress protected speech; vulgarity should not be allowed to subsume that which is protected.

In *Cohen v. California,* 403 U.S. 15 (1971), the Supreme Court held constitutionally protected the act of wearing a jacket bearing the words "!?X! the Draft" into a courthouse corridor. Writing for the Court, Justice Harlan stated that "while the particular four-letter word being litigated here is perhaps more distateful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." 403 U.S. at 25.

Therefore, I disagree with the distinction between instruction and entertainment drawn by Judge Milburn and the conflation of vulgarity and anti-establishment ideas set forth by Judge Peck. As the District Court correctly found, the school board in this case had to negate the testimony of its own members that the determinative causative factor in Mrs. Fowler's discharge was her decision to allow "antieducation, antifamily, antijudiciary, and antipolice" views to be expressed in her classroom. The District Court held that the school board failed to carry this *Mt. Healthy* burden. I agree with both of these findings. Therefore, I would affirm the judgment of the District Court.

Nos. 85-5815/5835

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

JACQUELINE FOWLER,

*Plaintiff-Appellee,*
*Cross Appellant,*

*v.*

THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY, *et al,*

*Defendants-Appellants,*
*Cross Appellees*

Decided and Filed June 1, 1987

Before: MERRITT and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

**JUDGMENT**

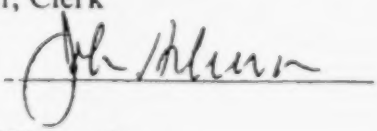
ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby vacated and the cause is dismissed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk



Eastern District of Kentucky
Filed July 30, 1987

Nos. 85-5815/5835

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

JACQUELINE FOWLER,
*Plaintiff-Appellee,*
*Cross-Appellant,*

*v.*

THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY, *et al,*
*Defendants- Appellants,*
*Cross-Appellees*

ORDER

Decided and Filed July 21, 1987

Before: MERRITT and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

UNITED STATES DISTRICT COURT

# EASTERN DISTRICT OF KENTUCKY

LEXINGTON

BOARD OF EDUCATION OF
LINCOLN COUNTY,
KENTUCKY,
*et, al.* *Defendants*

## FINAL JUDGMENT AND ORDER

★ ★ ★ ★ ★ ★

In accordance with the Findings of Fact and Conclusions of Law entered on the same date herewith, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The plaintiff has met her burden of proof that the defendants violated 42 U.S.C. § 1983 when they terminated her employment because she showed the film "*Pink Floyd - The Wall*" to Lincoln County High School students on May 31, 1984.

2. The defendant school board, as a corporate entity, and the school board members and superintendent, in their official capacity, are liable to the plaintiff for the following damages:

a. The plaintiff shall be reinstated to her former position as teacher at the Lincoln County High School.

b. The plaintiff shall receive back pay from the date of discharge until her reinstatement.

c. The plaintiff shall receive interest, at the legal rate, on her back wages.

d. The plaintiff shall receive reimbursement for any and all interest which she must pay to the Kentucky Teachers Retirement System to have her retirement account reinstated with said system.

e. The plaintiff shall receive the sum of $10,000.00 for the emotional distress the plaintiff has suffered due to the defendants' improper actions.

g. The plaintiff shall receive the sum of $353.48 for out-of-pocket expenses for travel and telephone calls in her job search and contact with her attorneys, all due to the defendants' improper actions.

h. The plaintiff shall be reimbursed for the costs expended in this action and the reasonable attorneys' fees incident to the prosecution of this action.

3. This action is now DISMISSED and STRICKEN from the docket.

4. This is a FINAL and APPEALABLE Order.

This 25th day of July 1985.

NOTICE IS HEREBY GIVEN
OF THE ENTRY OF THIS
ORDER OR JUDGMENT ON

_____

LESLILE G. WHITMER,
CLERK

BY: Mary B. Finnegan
D.C.

_____

SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

# UNITED STATES DISTRICT COURT
## EASTERN DISTRICT OF KENTUCKY
## LEXINGTON

CIVIL ACTION NO. 84-244

JACQUELINE FOWLER *Plaintiff*

vs.

BOARD OF EDUCATION OF
LINCOLN COUNTY,
KENTUCKY,
*ET, AL.* *Defendants*

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

★ ★ ★ ★ ★ ★ ★

Upon trial to this Court, and the Court having considered the evidence offered herein and arguments of fact and law made by counsel, the Court hereby does make the following findings of fact and conclusions of law:

### FINDINGS OF FACT

1. The plaintiff, Jacqueline Fowler, is, and was at all times relevant to this case, a duly certified teacher in the Lincoln County school system, Lincoln County, Kentucky.

2. At the end of the 1983-84 school year, plaintiff had been a teacher in the Lincoln County schools for the preceding fourteen school years and had achieved continuing contract status, or tenure, in that school system.

3. For the 1983-84 school year, plaintiff had been assigned the duties of a classroom teacher of civics and Latin at the Lincoln County High School in Lincoln County, a position

she had held for several years prior to the 1983-84 school year. In May, 1984, the age of plaintiff's students in her civics class was 15 to 16 years of age. The age of a majority of the plaintiff's students in her Latin I class was 15-18, although two class members were 14 years of age.

4. Defendant Joseph G. Blair is, and was at all times material to this case, the duly appointed and acting superintendent of the Lincoln County school system, and as such is and was the executive agent for the board with the authority to exercise the general, supervisory control over the public schools of Lincoln County. His duties included the making of recommendations to the board relative to the employment and discharge of teachers and all other school employees of the Lincoln County Schools.

5. Defendants Lloyd McGuffey, Jimmy Cooper, Ivan Singleton, Tom Blankenship and Paul Playforth were the five members who made up the Board of Education of Lincoln County in May, 1984. As the board, they had the authority generally to control and manage the public schools of Lincoln County under the laws of Kentucky, including the acceptance or rejection of recommendations of the superintendent relative to the employment and discharge of teachers of that school system.

6. Prior to May 31, 1984, plaintiff's performance record as a teacher in the Lincoln County schools was good. She had been selected "Teacher of the Year" in several prior school years.

7. May 31, 1984, was the last day of school for the students at Lincoln County High School. According to a practice accepted by those administering the high school, this day was not an instructional day for the students, but rather was a day planned as "report card day" in which teachers were to enter grades on report cards to be given the students. The teachers were further advised that they were to keep the students out of the halls on that day.

8. Since May 31, 1984, was a non-instructional day, plaintiff planned, as she and other teachers of the high school had

done in past years, to show video films to the students that day. Her lesson plan for that day indicated she would show a TV film and prepare report cards. Those in charge of the school were aware of this practice, and it was an accepted activity for the last day of school.

9. The Lincoln County High School maintained televisions and video equipment for use by the teachers in showing taped movies. A library of video tapes was kept at the high school for showing to students.

10. There was no policy, regulation, or directive which required any teacher at the high school to show only films from the school video library.

11. There was no policy, regulation, or directive from anyone in a supervisory capacity requiring teachers to obtain prior approval before showing to students a film not in the school library and brought in from an outside source.

12. There was no policy, regulation, or directive requiring a teacher to preview material prior to showing it to students.

13. A few days prior to May 31, 1984, several of plaintiff's students requested to see "*Pink Floyd - The Wall*" during the last day of school. Mrs. Fowler was not familiar with this film and did not at first agree to show it.

14. On May 30, 1984, Ms. Fowler did obtain a videotape of this movie from a rental store in Danville. There was no rating printed on the container of the film. She was advised by the person renting the film that while the film contained social issues of importance to teenagers, there was also some nudity in the film.

15. The movie, "*Pink Floyd - The Wall,*" involves the life of rock star Pink Floyd, who has become insane and, in retrospect, attempts to understand the reasons for his problems. The film depicts Pink's fatherless childhood, failed marriage, drug abuse, and ruined career.

16. The movie, "*Pink Floyd - The Wall,*" was given an "R" rating by the Motion Picture Association of America's Code and Rating Administration. An "R" rating requires that a film is not to be shown in a commercial motion picture

theater to persons under 17 years of age unaccompanied by a parent or adult guardian.

17. Mrs. Fowler did not preview the film before taking it to school the following day, as the tape was suited for a VHS recorder, and the video equipment which she owned was in Beta format and could not be used to preview the film. She was advised that the rental store no longer handled Beta tapes; therefore, she could not be provided with a Beta tape to preview. Because of the film's length, she could not preview the film on May 31 prior to showing it to her students.

18. On May 31, 1984, Mrs. Fowler took the tape, "*The Wall,*" to school and showed it to her students twice during the course of the day. The first showing was during her first-period civics class. One of the students, Charles Bailey, who had earlier seen the film at a theater, sat next to the television screen with a file folder in order to cover any scene involving nudity or any scene that might be sexually suggestive to avoid possible offense to some of the students. The film was shown in this manner, with either Charles Bailey, or at times plaintiff, blocking the screen when any material of a suggestive nature appeared during the first showing. The film is approximately ninety-five minutes in length.

19. During the first viewing of the film, plaintiff decided it contained sufficient value for her students to warrant showing it the second time to her Latin I class. The film was substantially edited the second time as it was the first, except a portion of the film, the "Young Lust" scene, was deleted altogether by "fast forwarding" the video machine on which the tape was played at the selected time.

20. The film itself, as shown in its entirety without any editing, contains a very limited amount of material which is sexually suggestive. The film contains no "simulated" sexual acts. There are scenes in the movie in which there is an implication that a sexual act between a man and a woman has occurred, may be occurring out of sight of the viewer, or

could occur in the future, but there is no depiction of any sexual act, nor any "simulation" of a sexual act. There are animated scenes which may have sexual overtones, depending on the perception of the viewer. The lyrics to the rock music which provides the background to the movie do contain a few four-letter words which are generally considered obscene. In addition, certain statements of the main character, Pink, contain a few four-letter words which are generally considered obscene. No particular emphasis is placed on these words in the movie, and one must listen quite intently to hear the words as they are spoken or sung.

21. A substantial majority of the evidence establishes that any scenes involving nudity or suggestive conduct were edited from the view of students in the previously-discussed manner during the two times the film was shown at the Lincoln County High School. (Plaintiff's Exhibit No. 1).

22. During the second showing of the film, an assistant principal of the high school, Michael Candler, visited plaintiff's classroom and viewed the movie for some forty-five minutes to an hour. Candler stated that he observed nudity in the film, but he left the room without complaining of the film to Mrs. Fowler and without any attempt to stop the showing of the film.

23. Later on May 31, 1984, the film was seized by the principal, and after having been viewed by the superintendent and board members on May 31 and the following day, the charge to terminate the contract of Mrs. Fowler was brought by the superintendent and board pursuant to Kentucky Revised Statute 161.790.

24. The complaints regarding the film did not originate from the students seeing the film, or from their parents, but originated with the school administrators themselves.

25. The notice to terminate the plaintiff's contract was served on her on or about June 19, 1984. This notice advised that a hearing would be held before the board on July 10, 1984. Within ten days of receipt of this notice, plaintiff made a written response to the board, advising of her inten-

tion to appear at the hearing to contest the charges made against her.

26. On July 10, 1984, plaintiff appeared with counsel at the hearing set by the board. At the beginning of the hearing, in the voir dire of the board members, facts emerged that showed that the board had previously viewed parts of the film. Furthermore, the board admitted that they had been approached by members of the community who felt Mrs. Fowler should be fired for showing the film.

27. Three members of the school board were to stand for re-election in the fall of 1984. One of those members was not re-elected.

28. The transcripts of the hearing before the Board of Education have been introduced as evidence and considered in full by the Court. The transcript establishes that counsel for Jacqueline Fowler conducted a detailed *voir dire* examination of the members of the school board, vigorously cross-examined all witnesses who testified concerning the circumstances surrounding the showing of the film, and offered testimony of the plaintiff and others in her defense.

29. After reviewing the film once in its entirety and once as the plaintiff had shown it, the board retired into executive session. The five members of the board were accompanied in executive session by defendant Superintendent Blair, who had made the charge and had testified against plaintiff; Bruce Johnson, the assistant superintendent, who had testified against Mrs. Fowler; and Mr. James Williams, the school board attorney, who had served as prosecutor in the termination hearing.

30. During part of the executive session held by the board, the plaintiff and her attorneys were invited to speak with the board. This discussion was recorded by the court reporter and made a part of the transcript of the board hearing introduced as plaintiff's exhibit #1.

31. At that session, the board members questioned plaintiff as to whether she would show the film again if they had not brought the charges against her. Plaintiff stated that yes,

she would show the film again; however, if it were to be shown again, she would have edited the film onto another tape rather than editing in the manner used on May 31, 1984.

32. At no time did the board pass any regulation or policy or ever orally or in writing order the plaintiff not to show the film again or not to show "R"-rated films again. At no time did plaintiff ever refuse to follow such an order by the board.

33. Following the executive session, the board returned to an open session and, acting upon the recommendation of the superintendent, voted unanimously to terminate the employment of Mrs. Fowler for "conduct unbecoming a teacher" and "insubordination" in the showing of the film.

34. The action of the defendants in terminating the contract of the plaintiff was based on their disagreement and dislike of ideas and views expressed in the film, "*The Wall.*" They disagreed with the fact that the film, in their view, reflected badly on motherhood, family, police, school authority, the judiciary, and other highly-held social values.

35. The film, "*Pink Floyd - The Wall,*" does have artisitic, literary, social and political value. The film deals with numerous issues of public concern, especially to a teenage audience. Values which this film reflects include the consequences of war, the difficulty of establishing meaningful relationships, the dangerous appeal of totalitarianism, the ill effects of drug abuse and alienation, and importance of the nuclear family.

36. Within thirty days of the vote to terminate Mrs. Fowler's contract, plaintiff filed this lawsuit challenging her termination.

37. As a result of plaintiff's termination, she has suffered loss of wages in the amount of $19,640.00

38. Due to the acts of the defendants set forth above, plaintiff has suffered damage to her professional reputation and will in the future suffer damage to her professional reputation in the amount of $10,000.00

39. As a result of the acts of the defendants set forth

above, plaintiff has suffered mental anguish and emotional distress as a result of said acts, to her loss in the amount of $10,000.00.

40. The plaintiff has suffered out-of-pocket expenses due to her termination, all to her loss, of: $77.60 in travel expenses in seeking other employment; $1.50 in telephone expenses in seeking employment; $91.25 in telephone expenses for contact with her attorneys and witnesses; $169.00 in travel expenses for meetings with her attorneys and for court appearances; $14.13 in prescription costs and medical bills.

41. The plaintiff has also suffered loss due to the necessity to remove her retirement contributions from the Kentucky Teachers' Retirement System.

## CONCLUSIONS OF LAW

1. The plaintiff, Jacqueline Fowler, was a duly certified "teacher" as that term is used and defined in K.R.S. 161.720(1), and had, at the time of the termination of her contract, achieved "continuing status" as that term is defined in K.R.S. 161.720 (5). As a result of plaintiff's continuing contract status, plaintiff had a right to continued employment under her contract which is protected by the fourteenth amendment right to no taking of property without dur process of law. *Board of Regents v. Roth,* 408 U.S. 564 (1972).

2. The defendant Board of Education of Lincoln County, Kentucky, is a body politic and corporate and may sue and be sued as such. K.R.S. 160.160. The defendants are officials whose action to terminate the plaintiff was taken under color of state law. 42 U.S.C. § 1983.

3. The defendant board is subject to suit and liability under 42 U.S.C. § 1983 and enjoys no eleventh amendment or sovereign immunity as a result of same. *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 280 (1977); K.R.S. 160.160.

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4. The federal and state claims asserted by plaintiff arise out of a common nucleus of operative facts, those being the defendants' action in terminating plaintiff's tenured teaching contract under K.R.S. 161.790 for showing *"The Wall."* Therefore, this Court has the authority to invoke, and does so invoke, pendent jurisdiction to hear the state claims raised by plaintiff. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966); *Culp v. Devlin,* 437 F.Supp. 20 (E.D. Pa. 1977).

5. Under the three-part test established by the United States Supreme Court in *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287 (1977), in order for the plaintiff to prevail, she must establish that she participated in a constitutionally protected activity and that the activity was a substantial or motivating factor in the decision to discharge her. As a defense, the defendants must prove by a preponderance of evidence that they would have reached the same decision to terminate her employment even in the absence of the protected activity.

6. Yet, teachers' exercise of first amendment rights in the schools is subject to reasonable regulation, just as it is in the community at large. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). The problem for the Court becomes one of arriving at the appropriate balance between the interest of the teachers in exercising their first amendment rights and that of the school board as an employer in promoting the efficiency of the services it provides through its teachers.

7. The defendants have admitted that the substantial and motivating factor in plaintiff's termination was her showing *"Pink Floyd - The Wall"* at Lincoln County High School on May 31, 1984. In addition, defendants have admitted that absent the showing of that film, they would not have terminated her tenured teaching contract. Thus, the issue to be decided is whether the plaintiff's showing of *"Pink Floyd - The Wall"* was protected speech under the first amendment.

8. While school boards have broad discretion in the

management of school affairs, the discretion of the local school board in matters of education must be exercised in a manner that comports with the transcendent imperatives of the first amendment. *Board of Education, Island Trees Union Free School District No. 26 v. Pico,* 457 U.S. 853, 864 (Plurality opinion) (1982).

> Boards of Education ... have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount principles of government as mere platitudes.

*West Virginia Board of Education v. Barnette,* 319 U.S. 624 at 637 (1943).

9. It is well established that public school teachers do not lose their constitutional rights simply because of their occupation. As the United States Supreme Court stated in *Tinker v. Des Moines Community School District,* 393 U.S. 503, 506 (1969):

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this court for almost 50 years.

10. Another important aspect to the application of the first amendment and the schools is the idea that the classroom should be a "marketplace of ideas.' *Keyishian v. Board of Regents of the University of New York,* 385 U.S. 589, 603 (1967).

> The fundamental notion underlying the First Amendment is that citizens, free to speak and hear, will be

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> able to form judgments concerning matters affecting their lives, independent of any governmental suasion or propaganda. Consistent with that noble purpose, a school should be a readily accessible warehouse of ideas.

*Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea,* 454 F.Supp. 703, 710 (D.C. Mass. 1978). These cases make it quite clear that Mrs. Fowler was entitled to complete protection of the first amendment while she was acting as a teacher for the Lincoln County Board of Education.

11. The United States Supreme Court has held, "Motion pictures are, of course, protected by the First Amendment." *Interstate Circuit v. City of Dallas,* 390 U.S. 676, 682 (1968). "Films convey ideas, and the right to receive the thoughts of others is a right protected by the first amendment. *Swope v. Lubbers,* 560 F.Supp, 1328, 1331 (D.C. Mich. 1983). The United States Court of Appeals for the Seventh Circuit, in examining the issue of the constitutional suppression of rock music held that suppression of the playing of rock music is a violation of free speech. *Reed v. Village of Shorewood,* 704 F.2d 943, 950 (7th Cir. 1983); *Fact Concerts, Inc. v. City of Newport,* 626 F.2d 1060, 1063 (1st Cir. 1980) *rev'd. on other grounds,* 435 U.S. 247 (1981).

12. The film shown by plaintiff to her high school students was a form of expression engaged in by her in relation to her students. The form of expression included the ideas portrayed in the movie, as well as the music. The film had significant artistic, social, literary, and political value and was expression which was entitled to protection under the first amendment to the U.S. Constitution.

13. The movie, "*Pink Floyd - The Wall,*" contained important social and political messages and values relevant to young people. Included in the messages the film conveyed were the horrors of war and the personal disasters war leaves on individuals; the value of a child being raised in a two-parent household; the alienation of generation, spouses and

persons in general; the horrors of drug abuse; and the terror and repression that results from a fascist government.

14. The members of the board of education objected to the film not only because of the language, suggested sex and fleeting nudity of the film in its *unedited* version, but also because they strongly disagreed with the message conveyed by the film *as they perceived it*. The board members believed that the movie reflected poorly on schools, motherhood, marriage, family, government, the judiciary, the police, and other valued institutions.

15. Yet, the board of education cannot discharge a teacher engaging in expression which is constitutionally protected simply because they do not agree with the content or the themes of that expression. *Minarcini v. Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976). In *Minarcini,* the Court of Appeals for the Sixth Circuit stated that library books could not be removed by school boards who wanted to "winnow" the library for books with which they disagreed or disapproved due to content. The Sixth Circuit further stated that one could not "place conditions on the use of the library which were related solely to the social or political tastes of the school board members." *Id.* at 582. By analogy, this rationale is equally applicable to the showing of video films to students.

16. Numerous courts have examined the issue of censorship of controversial ideas in the school environment and have found that such ideas are protected by the first amendment. In *Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea, supra,* an anthology of poetry was removed from the library due to its containing the poem, "The City to a Young Girl." Said poem contained various "street slang" obscenities. In holding the removal of the book unconstitutional. the Court stated that what was at stake was "the right to read and be exposed to controversial thoughts and language - a valuable right subject to first amendment protection." *Id.* at 714. In addition, the court stated that keeping the controversial

work available was important, as "[t]he most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control." *Id.* at 715.

17. The United States Supreme Court has held that constitutional protection is provided to all ideas with even remote redeeming social importance, including unorthodox ideas, controversial ideas, and ideas hateful to the prevailing climate of opinion, unless excludable because they encroach upon the limited area of more important issues. *Roth v. U.S.*, 354 U.S. 476, 484 (1957). The Supreme Court also spoke on these same principles in *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157-58, when it held:

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' *Don Quixote*, Shakespeare's *Venus and Adonis*, or Zola's *Nana*. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideaology foreign to our system.

18. The fundamental purpose of the first amendment is to protect free expression of controversial and unpopular ideas from state infringement. *Aumiller v. University of Delaware*, 434 F.Supp. 1273 (D.C. Del. 1977). Above all else, the first amendment means that government has no power to restrict expression because of its message, ideas, subject matter or content. *Police Department of Chicago v. Mosely*, 408 U.S. 92, 95 (1972); *Solid Rock Foundation v. Ohio State University*, 478 F.Supp. 96 (D.C. Ohio 1979).

19. Any portions of *"The Wall"* which include fleeting nudity or implied sexual activity constitute only minute segments of the one-hour-and-a-half film. In the edited version which the Court viewed, one had to listen very carefully

to discern any of the four-letter words stated during the course of the film. In addition, one had to use great creative imagination to perceive any of the alleged sexual connotations, and had to watch the screen very intently to see a glimpse of nudity, if any. In the Court's viewing at trial on April 1, 1985, it did not observe any nudity in the version as edited by the plaintifff and student Charles Bailey.

20. The defendants do not contend that the film, *"Pink Floyd - The Wall,"* was obscene as proscribed by *Miller v. California,* 413 U.S. 15 (1973), and *Ginzsburg v. New York,* 390 U.S. 629 (1968). The Supreme court, in *Eroznoznik v. City of Jacksonville,* 422 U.S. 205, 213-14 (1975), stated,

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the first amendment are no less applicable when government seeks to control the flow of information to minors.

21. This Court is of the opinion that any fleeting nudity or vulgar language which might have been seen or heard in the showing of *"Pink Floyd - The Wall"* in the plaintiff's classroom on May 31, 1984, does not remove the expression from first amendment protection. The Supreme Court in *Erznoznik* held that all nudity could not be deemed obscene even to minors, *Id.* at 213; and in *Roth* the Court held that, in fact, "the portrayal of sex ... in art, literature and scientific works is not itself sufficient reason to deny material the Constitutional protection of freedom of speech." *Id.* at 487.

22. Judged in its entirety, *"Pink Floyd - The Wall"* is not profane, vulgar, or obscene. The movie is protected by the Constitution, both as it was shown in the plaintiff's classroom on May 31, 1984, and in its edited form as viewed by the Court on April 1, 1985.

23. The fact that *"Pink Floyd - The Wall"* was rated "R" may not be used as a "standard for determination of constitutional status." *Swope v. Lubbers,* 560 F.Supp. 1328,

1334 (D.C. Mich. 1983), *citing Engdahl v. City of Kenosha Wisconsin,* 317 F.Supp. 1133 (E.D. Wis. 1970), and *Motion Picture Assoc. of America v. Spector,* 315 F.Supp. 824 (E.D. Pa. 1970).

24. The board of education's contention that they could discharge the plaintiff because such material as "*Pink Floyd - The Wall*" should not be shown in the Lincoln County schools fails to establish a substantial and legitimate governmental interest to override the plaintiff's protected speech. *Chelsea* at 713. The federal court in *Chelsea* held that the assumption that offensive language and themes might be harmful to high school students was not enough to establish some substantial and legitimate governmental interest to override the protected speech in question. In the present case, the defendants have failed to do more than state their opinion that the language and themes of "*Pink Floyd - The Wall*" were harmful to high school students. Thus, defendants have failed to establish any substantial and legitimate governmental interest as to override the plaintiff's right to protected speech.

25. In light of the fact that May 31, 1984, was a "non-instructional day," the plaintiff does not have to meet the "relevancy" requirement found in pure academic freedom cases. The question of "relevancy" in the first amendment context ususally arises in those cases which involve a teacher who has used some method or material or language in the classroom during a regular school day - a day in which the teacher was required to teach his/her assigned subject. The "relevancy" requirement is a determination of whether the teacher has performed the duties assigned. It is undisputed in the case at bar that May 31, 1984, was "grades day," and that no teacher was required or even expected to teach a substantive class. Therefore, the plaintiff is not required to show the relevancy between the showing of the movie, "*Pink Floyd - The Wall,*" and the substantive classes, civics and Latin, which she ususally taught during those class hours.

26. The board of education does not have greater power

to control a teacher's speech due to the fact that it involved school-age children in the classroom, where the work of the teacher carries great authority and where students were a "captive audience." *James v. Board of Education of Central District No. 1 of the Towns of Addison,* 461 F.2d 566, 573 (2d Cir. 1972), *cert. denied,* 409 U.S. 1042, *rehrg. denied,* 410 U.S. 947, *on remand,* 385 F.Supp. 209. In *James,* the court determined, "More than a decade of Supreme Court precedent leaves no doubt that we cannot countenance school authorities arbitrarily censoring a teacher's speech merely because they do not agree with the teacher's political philosophy or leanings." *Id.* at 573.

27. K.R.S. 161.790 (1) (b), which provides for termination of a teacher for "conduct unbecoming a teacher," is not unconstitutionally vague or overbroad. In addition, the board of education's textbook regulation which the plaintiff allegedly violated and the Kentucky statute from which it was taken, K.R.S. 158.190, are not unconstitutional for being vague and overbroad as well.

28. The plaintiff was provided adequate procedural due process at the July 14, 1984, school board hearing. She has failed to establish any improper procedures or that the board was biased in making their decision. The transcript of that hearing establishes that the plaintiff was represented by able counsel, who conducted an extensive *voir dire* of the board, vigorously cross-examined witnesses presented to support the charges, introduced lengthy testimony on behalf of the plaintiff, and made a vigorous closing argument, though no closing argument was made in support of the charges. The contention that the board of education had prejudged the facts and was biased against the plaintiff before the hearing began was not supported by the evidence. Inevitably, all the board members had heard about the showing of the movie in the plaintiff's classroom, which necessarily created some stir in the community. However, the Supreme Court, in *Hortonville Joint School District No. 1 v. Hortonville Education Assn.,* 426 U.S. 482, 493 (1976), held that knowledge of the

facts giving rise to the controversy and even expression of an opinion about it before the hearing does not disqualify a member of the board of education from considering or arriving at a decision.

29. The presence of the superintendent, the assistant superintendent, and the board attorney in the school board's executive session following the conclusion of the hearing did not taint the proceedings so as to establish a failure of procedural due process. The testimony established that there was no discussion or debate of any substance after the hearing except negotiations with plaintiff and her counsel in a vain attempt to try to arrive at a compromise.

30. This Court hereby finds that the plaintiff was terminated in violation of K.R.S. 161.790 in that her conduct as a matter of fact and law did not constitute conduct unbecoming a teacher or insubordination. As discussed previously, the showing of the film by the plaintiff was protected speech under the first amendment and, therefore, its showing did not constitute conduct unbecoming a teacher.

31. Plaintiff was terminated in violation of K.R.S. 161.790 because her conduct as a matter of fact and law did not constitute insubordination. K.R.S. 161.790 (1) (a) defines insubordination as a violation of lawful rules and regulations established by the local board of education for the operation of schools and refusal to recognize or obey the authority of the superintendent, principal, or any other personnel of the board in the performance of their duties. The evidence clearly established that there was no rule, regulation, or order forbidding outside materials to be shown with or without previewing or prior approval. It is undisputed that on May 31, 1984, there was no requirement that the plaintiff teach civics or Latin; she was only to find some means to keep her students out of the hallways. Therefore, she could not be legally insubordinate for failing to teach her classes when the day was not an instructional day. As has been discussed previously, the film was not in itself, as a matter of

fact or law, immoral so as to violate the school's textbook regulation or the statute from which it was derived, K.R.S. 158.190. Therefore, the plaintiff was not insubordinate to any textbook regulation as to what instructional materials she may use in the classroom. In addition, at no time was the plaintiff ever instructed not to show the film again; at no time did the board of education ever pass a regulation or policy that would prohibit the same. Thus, plaintiff did not refuse to obey the board's authority thereby constituting insubordination. Clearly, plaintiff's termination under K.R.S. 161.790 is totally without basis in law or fact, and it is therfore declared void, thus returning her to her position.

32. In light of the above, the Court concludes that the plaintiff's contract was improperly terminated because it was done in response to the plaintiff's exercising her rights protected under the first amendment to the Constitution, and but for the exercise of these rights, plaintiff's employment with the board would not have been so terminated. *Mt. Healthy City School District v. Doyle,* 429 U.S. 274 (1977).

33. Due to the actions taken by the defendants, the plaintiff is entitled to reinstatement to her former position as teacher at the Lincoln County High School, and is further entitled to receive back pay from the date of discharge until her reinstatement. *Mt. Healthy City Board of Education v. Doyle, supra,* at 283-284. In addition, plaintiff is entitled to interest on her back wages, an undisputed sum taken directly from the salary schedule. *Bituminous Casualty Corp. v. Lynn,* 503 F.2d 636 (6th Cir. 1974). If such a claim is liquidated, as is the claim in this action, interest flows as a matter of right. *McNutt v. State Farm Mutual Auto Insurance Co.,* 369 F.Supp. 381 (W.D. Ky. 1973), *aff'd.* 494 F.2d 1282 (6th Cir. 1973). The plaintiff is further entitled to reimbursement for any and all interest which she must pay to the Kentucky Teachers Retirement System to have her retirement account reinstated with said system.

34. Due to the above-described actions by the defendants,

the plaintiff has suffered emotional distress, and is therefore entitled to recover the sum of $10,000.00; she has suffered out-of-pocket expenses for travel and telephone in her job search and contact with her attorneys, and is therefore entitled to recover the sum of $353.48; she has suffered damage to her professional reputation, and is entitled to recover the sum of $10,000.00. *Carey v. Piphus,* 435 U.S. 247 (1978).

35. The plaintiff is entitled to recover the setforth amounts from the defendant board of education as a corporate entitity, and the school board members and superintendent in their official capacities only. The defendant board is subject to suit and liability under 42 U.S.C. § 1983 and enjoys no eleventh amendment or sovereign immunity. *Mt. Healthy City School District v. Doyle, supra;* K.R.S. 160.160. The individual school board members and the school superintendent are entitled to a qualified immunity from individual liability for damages under §1983 as established in the Supreme Court case of *Wood v. Strickland,* 420 U.S. 308 (1975). In *Wood,* the Court held that members of the school board were immune from personal liability in performing their duties, unless they acted maliciously or knew or should have known that the actions taken within the sphere of their official responsiblility would violate the constitutional rights of the student affected. The Supreme Court more recently in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), has held that government officials performing discretionary functions generally are shielded from liability, as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 818.

36. It is clear to this Court that no reasonable person would or should have known that the discharge of the plaintiff for showing the movie, "*Pink Floyd - The Wall,*" would be a violation of her constitutional right of freedom of expression. This entire body of constitutional law is very cloudy and confusing, and it cannot be expected that lay school board members whould know whether their actions

were in violation of plaintiff's constitutional rights. The plaintiff's right to freedom of expression was not clearly established so as to expect the defendant board members and superintendent to know they werre violating plaintiff's rights. Board members are not charged with predicting the future course of constitutional law. *Sapp v. Renfroe,* 511 F.2d 1972 (11th Cir. 1975). Therefore, under *Wood v. Strickland,* and *Harlow v. Fitzgerald,* the school board members and superintendent are entitled to qualified good-faith immunity and are not liable in their individual capacities.

37. The monetary award of the salary unlawfully withheld from plaintiff represents equitable restitution and constitutes liability of the members of the board in their official capacity which is payable by the school district. *Brown v. Bathke,* 566 F.2d 588 (8th Cir. 1977); *Owen v. City of Independence,* 560 F.2d 925 (8th Cir. 1977). The good-faith immunity which the school board members and superintendent enjoy applies only to the compensatory damages, and not equitable relief. *Brown* at 593.

39. The acts of the defendants were not intentional, willful, nor performed with malice, and therefore the plaintiff is not entitled to punitive damages.

A separate Final Judgment and Order reflecting these findings and conclusions shall be entered this date.

This 25th day of July 1985.

SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

# EASTERN DISTRICT OF KENTUCKY

I, Leslie G. Whitmer, Clerk of the United States District Court for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original docket entries in the case of Jacqueline Fowler vs. Board of Education of Lincoln County, Kentucky, *et al*, Civil Action Number 84-244 on the Lexington docket now remaining among the records of said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Lexington this 13th day of October, A.D. 1987

LESLIE G. WHITMER
Clerk.

Mary B. Finocchiaro

By Mary B Finocchiaro,

(1) 7-31-84 Complaint. 1 summons and 1 copy issued for deft. Bd. of Ed. of Lincoln County, 1 summons and 1 copy issued for all other defts as Individuals; 1 summons and 1 copy issued for all other defts, in official capacities and given to atty for service.
(2) 8-6-84 Summons as to deft. Board of Education of Lincoln Co., Ky. w/service executed 8-2-84 by Lincoln Co. Sheriff.
(3) 8-6-84 Summonses as to deft. Blair, Indiv. & as member, Board of Education w/service executed 8-2-84 by Lincoln Co. Sheriff.
(4) 8-6-84 Summonses as to deft. McGuffey, Indiv. & as member, board of Education w/service executed 8-2-84 by Lincoln Co. Sheriff.
(5) 8-6-84 Summonses as to deft. Cooper, Indiv. & as member, Board of Education w/service executed 8-1-84 by Lincoln Co. Sheriff.
(6) 8-6-84 Summonses as to deft. Singleton, Indiv. & as member, Board of Education w/service executed 8-2-84 by Lincoln Co. Sheriff.
(7) 8-6-84 Summonses as to deft. Blankenship, Indiv. & as member, Board of Education w/service executed 8-1-84 by Lincoln Co. sheriff.
(8) 8-6-84 Summonses as to deft. Playforth, Indiv. & as member, Board of Education w/service executed 8-2-84 by Lincoln Co. Sheriff.
(9) 8-14-84 Notice of Atty. Gen. of Ky. of Intent not to Intervene in action.
(10) 8-22-84 Answer of all defts. and their motion to dismiss.
(11) 8-28-84 SCHEDULING ORDER (SR) ent: 1) New Parties to be joined & Pleadings Amended by 9-17-84. 2) Motions to dismiss due by 9-17-84. Responsive Memoranda to be filed 15 days from date of service of. mot. 3) Discovery to be completed by 10-26-84. 4) Motions for Summary Judgment to be filed by 11-12-84. Responsive memoranda to

be filed 15 days after date of service of motion. 5) All motions shall be noticed for hearing at convenience of Court. 6) Parties shall move for Pre-Trial Conf. or file a Joint Status Report by 12-26-84 setting forth reasons case is not ready for trial. and 7) Schedule shall be modified only by leave of Court upon showing of good cause. Copies as noted.

(12) 9-27-84 Notice of plff to take Depositions of Individual defendants.

(13) 10-2-84 Interrogatories of plff. to defts.

(14) 10-12-84 Interrogatories of defts. to plff.

(15) 11-1-84 ANSWERS of Defts to Interrogatories.

(16) 11-8-84 Answers of pltf. to defts. Interrogatories.

(17) 11-29-84 Motion of Plff. to assign for trial or in alternative for pre-trial conference.

(18) 12-3-84 Deposition of Jacqueline Fowler taken on 10-23-84 at 12:30 p.m. at Stanford, Kentucky, taken on behalf of defendant.

(19) 12-3-84 Deposition of Paul Playforth, Ivan Singleton, James Cooper, Lloyd McGuffey, Tom Blankenship, and Joseph Blair taken on behalf of plff. on 10-23-84 at 9:00 a.m. in Stanford, Kentucky.

(20) 12-3-84 ORDER (SR) ENT: Upon motion of plff., pre-trial conference shall be held on 1-16-85 at 3:00 p.m. in Courtroom A at which time Court shall establish trial date. Copies as noted.

(21) 1-16-85 Agreed stipulation that transcript of evidence taken at hearing before Lincoln County Board of Education on 7-10-84 and 7-16-84 and all exhibits introduced at trial are made part of record and may be used as evidence and for any and all purposes by any party herein.

(22) 1-17-84 ORDER (SR) ent: Pretrial conference held 1-16-85 1) Agreed stipulation, transcript of evidence and exhibits mentioned therein and all exhibits instructed at hearing 1-16-85 made part of record and may be used as evidence for any

and all purposes by any party, shall be filed. 2) Counsel for defts. shall file memorandum in support of defts' motion to dismiss within two weeks and cousel for plff. given two weeks thereafter to file a response. 3) Action assigned for court trial on Monday, 4-1-85 at 9:30 a.m., Courtroom A. 4) Counsel shall premark all exhibits to be introduced at trial and submit list of said exhibits to courtroom deputy clerk. 5) Counsel shall exchange witness lists with copy of same to be furnished to courtroom deputy clerk not later than 10 days prior to trial. 6) Proposed Findings of Fact and Conclusions of Law shall be submitted to court not later than 7 days prior to trial. Copies as noted.

(23) 1-31-85 Memorandum of defts on Motion to dismiss on jurisdictional grounds.

(24) 2-14-85 Response of plff. to deft's. motion to dismiss.

(25) 2-25-85 Reply of defts'. to plff's. Memorandum.

(26) 3-12-85 Motion of defts. for Postponement and Continuance of Trial.

(27) 3-12-85 Motion of defts. for Final Pre-Trial Conference.

(28) 3-13-85 Response of plff. to Motion of deft. for Pre-Trial Conference and Response to Motion for Postponement or Continuance of Trial.

(29) 3-18-85 ORDER (SR) ent: Action set for hearing on Thursday, 3-21-85 at 10:00 a.m., Courtroom A, Lexington, on all matters permitted under FRCP 16 and on defts'. pending motions for continuance of trial date and on defts'. pending motions for continuance of trial date and on defts'. pending motion to dismiss complaint. Copies as noted.

(30) 3-21-85 ORDER (SR) ent: 1) Motion of defts. to dismiss denied without prejudice as to consideration of pendent state claims in view of evidence. 2) Motion of defts. for postponement and continuance of trial denied. 3) Parties permitted to waive order of taking proof in trial. 4) Counsel given 3 additional days to submit witness lists. 5) Parties are to

stipulate the amount of salary the plff. would have received had she been employed by Lincoln County Schools for school year 1984-85. 6) That, at trial, film in issue shall be shown to Court, once in its unedited version, and twice in its edited versions. 7) Defts. shall furnish equipment needed in order to show film. Copies as noted.

(31) 3-28-85 Supplemental Answers of Plff. to Interrogatories.

(32) 3-28-85 Second Supplemental Answers of Plff. to Interrogatories.

(33) 3-29-85 Motion of Herald-Leader and Art Jester in Support of Motion to Quash Subpoena and for Protective Order.(35) 4-2-85 CIVIL MINUTES - TRIAL ent: Trial began 4-1-85, not concluded. Continued to 4-2-85 at 9:30 a.m. Copies as noted.

(36) 4-2-85 ORDER (SR) ent: Hearing held 4-1-85 - Upon filing of stipulation by plff. and defts., motion of Herald-Leader and Art Jester to Quash Subpoena granted, and subpoenas issued on behalf of plff. to other newspaper reporters shall not be enforced. Copies as noted.

(37) 4-2-85 Agreed Stipulation regarding evidence intended to be introduced through testimony of newspaper reporters subpoenaed on behalf of plff.

(38) 4-2-85 CIVIL MINUTES - TRIAL ent: ORDER (SR) ent: Motion of defts for dismissal pursuant to Rule 41 (b), FRCivP denied. Evidence of plff. resumed and concluded. Evidence for deft begun., not concluded. Trial continued to 4-3-85 at 1:30 p.m. Copies as noted.

(39) 4-4-85 CIVIL MINUTES - TRIAL ent: Trial resumed on 4-3-85, not concluded. Continued to 4-4-85 at 10:30 a.m. Copies as noted.

(40) 4-4-85 CIVIL MINUTES - TRIAL ent: resumed and concluded. Counsel for defts given 11 days to file brief; counsel for plff. given 10 days thereafter to file brief. Action to stand submitted at expiration of 21 days. Copies as noted.

(41) 4-15-85 Post-Trial Brief of Defendants.

**VOLUME II**

(42) 4-25-85 Post-Trial Brief of Plaintiff.
(43) 7-25-85 FINDINGS OF FACT AND CONCLUSIONS OF LAW (SR) ent: Copies as noted.
(44) 7-25-85 FINAL JUDGMENT AND ORDER (SR( ent: 1) Plff. has met burden of proof that defts violated 42 U.S.C. 1983. 2) Deft school board, as corporate entity, and school board members and superintendent, in a) Plff. shall be reinstated to former position as teacher at Lincoln County High School. b) Plff. shall receive b ack pay from date of discharge until reinstatement. c) Plff. shall receive interest, at legal rate, on her back wages. d) Plff. shall receive reimbursement for any and all interest which she must pay to Kentucky Teachers Retirement System to have her retirement account reinstated with said system. e) Plff. shall receive $10,000 for emotional distress suffered. f) Plff. shall receive $10,000 for damage to her professional reputation. g) Plff. shall be reimbursed for costs expended in this action and the reasonable attorneys' fees incident to the prosecution of action. 3) Action dismissed and stricken from docket. 4) This is final and appealable order. Copies as noted with Notice of Entry.
(45) 8-2-85 Post-Trial Motions of defts: 1) To make additional findings, delete other findings and amend other findings of fact, pursuant FRCP52 (b) 2) For new trial, new findings, new conclusions, and new judgment under FRCP 59 (a) (2), or amendment of judgment under 59(e). 3) To stay execution of or any proceedings to enforce judgment entered 7-25-85 pending disposition of first two motions, pursuant to FRCP 62(b).
(47) 8-8-85 Response of Plff. to defts' Post-Trial Motions.
(48) 8-9-85 ORDER (SR) ent: At hearing on defts' motions for a new trial, new findings, new conclusions, & a new judgment under FRCP 59(a) (2) or amendment of judgment under FRCP 59 (e), & to stay execution of any proceedings

to enforce judgment entered on 7-25-85, pending disposition of first two motions pursuant to FRCP 62(b), Court concluded that record clearly & adequately reflects findings of Court & Court's conclusions of law; that present motions are in main a rehash of arguments previously considered & decided & Court further concludes that further elaboration is unnecessary or to again elucidate the decisions of Court previously made & expressed. Court therefore Denies the first two post-trial motions filed. The motion for stay pending disposition of the first two motions are MOOT. Copies as noted. Notice of Entry.

(49) 9-6-85 Notice of Appeal of defts. Copies as noted.

(50) 9-16-85 Notice of Cross appeal of plff. Copies as noted.

(51) 9-16-85 Designation of Record by defts.

(52) 9-17-85 Transcript Order of defts.

(53) 9-20-85 Motion of defts for Stay of Judgment Pending Appeal and Setting of Supersedeas Bond.

(54) 9-23-85 Response of plff. to Motion of deft for Stay of Judgment Pending Appeal.

(55) 9-24-85 Transcript Order of plff.

(56) 9-24-85 Designation of Record for Cross-Appellant (plff.).

(57) 9-26-85 Acknowledgement of 6CCA of receipt of Notice of Ppeal, Their #85-5815

(58) 9-26-85 Acknowledgment of 6CCA of receipt of Notice of Cross-Appeal, their #85-5835.

(59) 10-15-85 Bill of Costs of plff. in amount of $623.35. Taxation of Costs ent 10-15-85: Costs in sum of $623.35 in favor of plff. Copies as noted.

(60) 10-15-85 Memorandum of plff. Support of Bill of Costs.

(61) 11-8-85 Application of plff. for Award of Atty's. Fees, Costs & Expenses.

(62) 11-12-85 Notice of defts of Filing Amended Supersedeas Bond.

(63) 11-12-85 Amended Supersedeas Bond. FILED - Reference #67.
(64) 11-18-85 Request of defts-appellants to Retain Record in District Court.
(65) 11-22-85 ORDER (6CCA) ent: Extension of time granted to 12-16-85 for Court Reporter to file transcript.

**VOLUME III**

(66) 11-25-85 Motions (to defer action on application of plff's. counsel for atty. fees and for reasonable time to respond to application for atty. fees) and Preliminary Response of deft to Plff's. Appllication for Award of Atty. Fees.
(67) 12-4-85 ORDER (SR) ent: Upon motion of defts for order staying enforcement of final judgment and order entered 7-25-85, ORDERED 1) Enforcement of such final judment and order, save and except so much of final judgment and order reinstating plff. to former position as teacher in Lincoln County High School, and any other proceeding in connection with this matter is stayed pending disposition of defts' appeal. 2) Amended supersedeas bond in sum of $100,000 tendered by defts on 11-12-85 approved and filed. 3) Stay order shall also apply to plff's. request for attys'. fees and bill of costs. Copies as noted.
(68) 12-6-85 Request of plff. for Determination as to Award of Attorneys' Fees.
(69) 12-12-85 Response of defts to Request for Determination of Attorney Fees.
(70) 12-30-85 Transcript of Court Trial - VOLUME I.
(71) 12-30-85 Transcript of Court Trial - VOLUME II.
(72) 12-30-85 Transcript of Court Trial - VOLUME III.
(73) 12-30-85 Transcript of Court Trial - VOLUME IV.
(74) 2-27-86 ORDER (SR) ent: Defts having filed motion for Court to enter order directing Clerk temporarily retain record to assist counsel in preparation of briefs, ORDERED said motion granted. Clerk directed to temporarily retain

record of action to assist counsel in preparation of briefs. Clerk retain said record until further orders of the Court. Copies as noted.

(75) 3-31-86 Motion of plff. to Withdraw Exhibit for Purposes of Copying. (video-tape portion of trial)

(76) 4-24-86 ORDER (SR) ent: Plff's. motion for Court to permit plff's. counsel to counsel shall be permitted to remove tape from Court's records on 4-30-86 and said video-tape shall be returned to Clerk of Court no later than 5-2-86 at 4:00 p.m. Video-tape shall be removed for limited purpose of making copy of tape for plff's. appellate counsel. FURTHER ORDERED defts' appellate counsel shall be permitted to have copy of video-tape made (if they so desire) while tape is released to plff's. counsel for that purpose. Copies as noted.

(77) 4-19-86 ORDER (SR) ent: Plff's. request for determination of atty's. fees denied. Copies as noted.

(78) 9-22-86 ORDER (SR) ent: Upon showing that all briefing has now been completed, ORDERED Clerk of Court release record herein and transmit said record to Clerk of U.S.C.A. for 6th Cir. Copies as noted.

9-22-86 Certified record forwarded to 6CCA. Copy of docket to attys.

(79) 7-30-87 COPY OF JUDGMENT of 6CCA issued as Mandate 7-29-87 & Opinion Judgment of district court vacated and cause dismiss, each party to bear its own costs. Copies as noted.

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-657

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1987**

JACQUELINE FOWLER
*Petitioner*

vs.

THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY; JOSEPH G. BLAIR, INDIVIDUALLY AND AS SUPERINTENDENT OF THE LINCOLN COUNTY SCHOOLS; LLOYD McGUFFEY; JIM COOPER; IVAN SINGLETON; TOM BLANKENSHIP; AND PAUL PLAYFORTH, INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITIES, RESPECTIVELY, AS A MEMBER OF THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY,
*Respondents*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

F. C. BRYAN
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*Counsel of Record For Respondents*

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## QUESTION PRESENTED

Whether a high school teacher who permits, then endorses, the showing as entertainment for her students of an "R" rated video containing indecent language, nudity, obscene figures, violence and sexual intercourse in her classroom during school is immunized from dismissal by the First Amendment to the United States Constitution.

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*Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), *reh. den.* 413 U.S. 881 (1973) ..... 7

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*Rankin v. McPherson*, 483 U.S. ____, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) ..... 5

No. 87-657

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1987**

JACQUELINE FOWLER
*Petitioner*

vs.

THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY; JOSEPH G. BLAIR, INDIVIDUALLY AND AS SUPERINTENDENT OF THE LINCOLN COUNTY SCHOOLS; LLOYD McGUFFEY; JIM COOPER; IVAN SINGLETON; TOM BLANKENSHIP; AND PAUL PLAYFORTH, INDIVIDUALLY AND EACH IN HIS OFFICIAL CAPACITIES, RESPECTIVELY, AS A MEMBER OF THE BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY,
*Respondents*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**To the Honorable William H. Rehnquist, The Chief Justice, and Associate Justices of the Supreme Court of the United States:**

## STATEMENT OF THE CASE

Acceding to a request by two male students, Petitioner, Jacqueline Fowler, a civics teacher employed by the Lincoln County Kentucky Board of Education, permitted the videotape, "Pink Floyd-The Wall", to be twice shown in her classroom on the last day of school while grades were being recorded.

Petitioner had not previously seen the film. She did not review it before it was exhibited to her students, who were freshmen, sophomore and junior boys and girls 14 to 17 years of age. The picture was shown during class while school was in session at regular classroom periods. The purpose of the film was to entertain the students while report cards were being marked and distributed by the teacher who sat in the back of the classroom.

One of the boys, age 15, who had already seen the film and had recommended it as good entertainment told Mrs. Fowler it "had one bad place in it." Petitioner stationed this young man at the front of the room near the television set with an 8½ x 11 inch file folder. She instructed him to hold the folder in front of the 25 inch television screen to block out the scenes he thought the other students shouldn't see.

The videotape is an exact copy of an "R" rated motion picture containing indecent language, nudity, foreplay and sexual intercourse, an animated depiction of male private parts, a rape scene, implied oral sex, masochism and violence interspersed throughout the 90 minute presentation.

All portions of the soundtrack containing indecent language[1] were played to the students during both an afternoon and morning showing. As to both extent and effect, the file folder editing of visual material was indifferently successful. Some of the salacious material was at least partially blocked on one or other of the two screenings, but clearly much of it was not. (Petitioner's Appendix A-4).

All pretense of editing was abandoned while the teacher was absent from the room on several occasions. Even when Petitioner was in the classroom, she was examining her grade book, marking report cards and not paying much attention to the film.

Neither the students and their parents nor the school administration was forewarned of the nature of this film. There was no

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[1] The particular words used were the vulgar terms synonymous with sexual intercourse, excrement and male genitals.

discussion of the film before, during, between or following the two showings.

Perforce in retrospect, Petitioner contended during disciplinary proceedings resulting in her dismissal that the picture contained valuable "themes and messages." In permitting it to be shown, she asserts she was shielded by the First Amendment so that her discharge for conduct unbecoming a teacher was constitutionally invalid.

Following a bench trial, the district court agreed with Petitioner's position. The United States Court of Appeals for the Sixth Circuit, which viewed the film and analyzed the testimony, disagreed and dismissed Petitioner's claim.

## SUMMARY OF ARGUMENT

1. The showing of an "R" rated film containing indecent language, nudity, scenes of foreplay, sexual intercourse, obscene figures, violence and rape to a captive audience of school children in the classroom is not entitled to First Amendment protection.

2. The school board was not required by *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) to fragment the film and to imagine, articulate or establish what action it would take had an altogether different version been shown instead of what was actually presented in the classroom.

3. The conclusions reached by the Court of Appeals for the Sixth Circuit are entirely correct and consistent with the decisions of other circuits insofar as these bizarre facts can really be compared with any other reported cases. The underlying principles follow precisely the applicable considerations recently enunciated by this Court.

4.The decision in favor of the school board in no way suppresses any legitimate right of free expression nor poses any dilemma for other teachers who need only apprise themselves of the nature of the materials to which their students are to be exposed and to exercise common sense to avoid recurrence of an incident anything like this.

## ARGUMENT

### I.

The determination by the Court of Appeals is correct beyond need for further review. Last term, this Court in *Bethel School District*

*No. 403 v. Fraser*, 478 U.S. ___, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) stated that the education of youth involves more than "books, the curriculum and the civics class"; and that teachers "demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of the class. Inescapably, like parents they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil mature conduct cannot be conveyed in the school that tolerates lewd, indecent or offensive speech and conduct... ."

For those reasons, "(N)othing in the Constitution prohibits the states from insisting that certain *modes of expression* are inappropriate and subject to sanctions." (Italics added).

Nonetheless, Petitioner continues to seek constitutional imprimatur for "Pink Floyd-The Wall", despite its implied oral sex, anthropomorphic "flower scene" as the male penetrates the female while the blossoms assume human form, and a judicial figure which, from Petitioner's own perspective, is portrayed in animation as a giant penis with testicles around the neck.

Equally askew is Petitioner's reliance (and that of the dissenting judge in the Sixth Circuit) on *Cohen v. California*, 403 U.S. 15 (1971), *reh. den.* 404 U.S. 876 (1971), invoiving the vivid anti-draft message on the back of the defendant's jacket.

It is indeed true that the word displayed by Cohen is identical with one of the indecent words on the soundtrack of "Pink Floyd-The Wall". Even though the offensive use of foul language in a public place to express some viewpoint was not, in *Cohen*, a criminal offense that does not make the same language acceptable entertainment in a school classroom any more than an exhibition of "Carnal Knowledge", for example, might be endorsed simply because its exhibitors could not be jailed for obscenity for showing the film in a theater. *Jenkins v. Georgia*, 418 U.S. 153 (1974).[2]

In *Bethel School District No. 403 v. Fraser*, supra, this Court instead endorsed Judge Newman's observation that, "The First Amendment gives a high school student the classroom right to wear Tinker's

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[2] As in *Jenkins*, the nature and content of a film made part of the record was as accessible to an appellate court as to the trial court so that "Pink Floyd-The Wall" was properly reviewed independently by the Court of Appeals for the Sixth Circuit.

armband but not Cohen's jacket." A teacher serving as an example surely has no greater right.

This matter does not implicate genuine tension between the free expression of ideas by employees on school property and the educational system's task of exemplifying and imparting values. Jacqueline Fowler was not expressing ideas as a citizen on matters of public interest while she happened to be beyond the school house gate. c.f. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); or *Rankin v. McPherson*, 483 U.S. ____, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Instead, she was conducting her classes within the course and scope of her duties as a teacher.

Unlike decisions typified by *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589 (1967), action was not taken by a public employer based on petitioner's own political views, or, for that matter, because she liked rock music, "R" rated motion pictures or really because of her own convictions about anything.

Nor was communication or expression improperly stifled. The motion picture is or was available on tape and in theatres where minors under age 17 could see it if accompanied by such consenting parents or adult guardians as might have different ideas about what their children should see; an option unfortunately not provided here.

This kind of material has always been available to those who seek it. School administrators realize that students outside school hours can gain access to just about anything. None of this means that schools aspiring to different goals from the purveyors of indecency are powerless to act when the classroom becomes the forum and the school the involuntary sponsor of such exhibitions, which need not descend to the level of child pornography to be rejected as a legitimate school event. c.f. *Ginsberg v. New York*, 390 U.S. 629, *reh. den.* 391 45971 (1968), 390 U.S. 629 (1968).

As with most films, this picture does tell a story — that of a rock music star, "Pink Floyd", who becomes a drug addict and goes insane because of various misfortunes he perceives have befallen him, including the death of his father in the war, an over-possessive mother, an unfaithful wife, a harsh school and annoying female rock "groupies"[3].

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[3] These are the young women who remove their upper clothing in the "Young Lust" sequence.

Years ago in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court characterized freedom of expression as a joinder of belief and conduct. Since Jacqueline Fowler had not seen the film, there remained, as the Court of Appeals correctly held, only her conduct in permitting the film selected by two boys to be shown in her class.

After an evidentiary hearing, the school board explored and discussed with Petitioner and her attorneys alternatives to dismissal, including some assurance this kind of incident would not recur. Instead, petitioner insisted that the film's themes and messages cloaked her with First Amendment protection, notwithstanding the school board's concerns.

Petitioner has never suggested, however, that any message evoked by this rock video could not have been expressed other than through the medium of indecent language, obscene figures, upper female nudity, sexual intercourse and masochism. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *reh. den.* 439 U.S. 883 (1978).

It is argued that films, just as other modes of expression, are entitled to First Amendment protection. That is not the question here. All manner of speech is not protected at all times irrespective of what is said and where it is said. Neither is a film protected regardless of the circumstances in which it is shown.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), it was recognized that the public commercial exhibition of a motion picture containing some indecent material may not be suppressed simply because some children might see it, just as *Cohen* was not subject to the prosecution in part because persons who might be offended could avert their eyes. In contrast, "Pink Floyd-The Wall" was directed at the students who were supposed to see it. That was the only reason it was shown.

## II.

Petitioner strives to shape the holding in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) to urge that if any part of the motion picture was unobjectionable, the school board could not validly discharge her unless it had fragmented the film to imagine a photoplay without indecent language, nudity and other fulsome materials.

The rationale of *Mt. Healthy* places an offending employee in no better position just for having engaged in protected expression. Where discrete acts are implicated, proof that the employee would

have been discharged irrespective of protected expression may, if such evidence exists, be adduced and presented.

The school board did not appreciate some of the "messages" claimed for this film, as, for example, a scene where school children revolt, vandalize and burn down the school and carry an unpopular teacher out to an unpleasant fate; or another, the "neo-Nazi" sequence, during which the hero tells his henchmen to take out the "coons" and "queers" and shoot them. A rape scene, explicit brutality and an episode during which the hero lacerates his bare chest with a broken razor blade were not well received.

In any case, all five school board members strongly objected to the sexual content, vulgarity and violence contained in the movie (Petitioner's Appendix, A6). Material of that nature recurs continually throughout the entire film. It was simply impossible for the school board to hypothetically envision a totally expurgated film and then to speculate and offer substantive proof regarding what action would have been taken had an entirely different motion picture been presented from that actually shown.

Judge Merritt's dissent contending that the teacher's "academic freedom" to express themes and messages should not be subsumed by the vulgar mode of expression is misconceived for at least three distinct reasons:

1. Even to the extent "academic freedom" may exist in the high school setting in the sense of recognizing a teacher's right to teach subjects as she sees fit,[4] no such right has even been claimed here for this motion picture presented as entertainment. Moreover, the fact that it was intended as entertainment instead of a school subject did not grant the teacher carte blanche to abdicate her responsibilities as an exemplar. "Certainly a state also may take into account a teacher's function as an example for students which exists independently of particular classroom subjects." *Ambach v. Norwick*, 441 U.S. 68 (1979).

2. "The medium is the message". As this Court observed in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), *reh. den.* 413 U.S. 881 (1973), "Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved

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[4] The "freewheeling inquiry" in the university setting surely differs from the goal of illustrating values for adolescent children.

to a bar or 'live' theater stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

3. Reliance on *Cohen v. California*, supra, is misplaced, in light of this Court's discussion of that decision in *Bethel School District v. Fraser*, supra. School administrations may and should require standards higher than merely refraining from criminal obscenity. Rather, "(T)he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Bethel School Dist. No. 403 v. Fraser*, supra.

## III.

Petitioner contends the decision of the Court of Appeals for the Sixth Circuit conflicts with that of another circuit, citing *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969). A vulgar term was used to make a scholarly point in an article in the "Atlantic Monthly" written by a psychiatrist and professor. The article was distributed to high school seniors as part of an English assignment. Apart from the obvious factual distinction between an article in the "Atlantic Monthly" and the motion picture "Pink Floyd-The Wall", the petitioner, Jacqueline Fowler, claims no academic relevance whatever.

The indecent language, nudity and obscene materials occurring throughout this motion picture were not included for scholarly analysis but to shock and titillate the sensibilities of an audience composed of students under the teacher's care.

## IV.

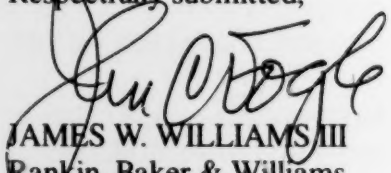
Finally, petitioner fears that affirmance of the Sixth Circuit's decision would discourage the classroom presentation of serious literature, including Shakespeare and Chaucer. Should some entrepeneur come up with a topless film of a Shakespearean play, the Bard's unwitting participation would not transform the production into befitting classroom amusement. As this Court once remarked, "(A) quotation from Voltaire in the fly leaf of a book will not constitutionally redeem an otherwise obscene publication...". *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972).

Fear of teacher uncertainty is groundless. The problem encountered by Jacqueline Fowler can easily be avoided by previewing the material to be presented. Any competent teacher could then readily distinguish worthwhile literature from the film, "Pink Floyd-The Wall".

## CONCLUSION

For the reasons set forth above and in the well considered opinion of the United States Court of Appeals for the Sixth Circuit, the petition should be DENIED.

Respectfully submitted,



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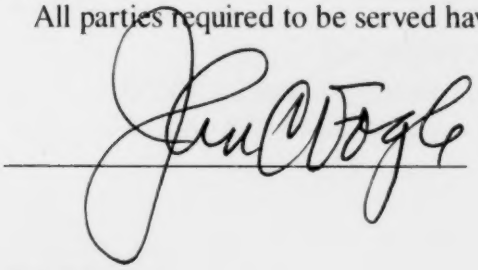
## CERTIFICATE OF SERVICE

John C. Fogle, a member of the Bar of the Supreme Court of the United States and counsel of record for Respondents herein, hereby certifies that on November 17, 1987, pursuant to Rule 28 of the Revised Rules of the Supreme Court of the United States, he served three (3) copies of the foregoing Brief For Respondents in opposition to writ of certiorari on Petitioner, Jacqueline Fowler, as follows:

On November 17, 1987, by depositing such copies in the United States Post Office at Mt. Sterling, Kentucky, with first class postage prepaid, properly addressed to the post office address of Arthur L. Brooks and Jane V. Fitzpatrick, above named Petitioner's counsel of record at 183 North Upper Street, Lexington, Kentucky 40507.

All parties required to be served have been served.



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